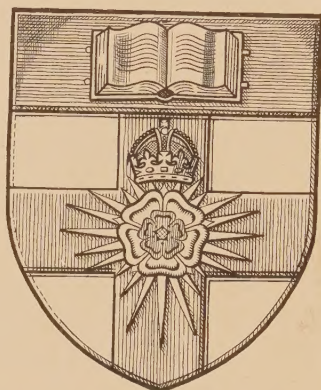


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AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL:

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS

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PUBLISHED BY THE COUNCIL AT ITS OFFICE, 3 STONE BUILDINGS,
LINCOLN'S INN, LONDON, W.C.2,

AND

PRINTED BY THE EASTERN PRESS, LTD., LONDON AND READING

P. 1952.

b



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[1952] 1 K.B. [1952] 2 Q.B. [1952] P.

In the Third Series,
[1952] A.C.

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ERRATUM

READ *v.* READ, ante, p. 119, at p. 120. Counsel should read:—
N. R. Blaker for the husband.
C. Ingram Poole for the wife.

CASES

DETERMINED BY THE

PROBATE, DIVORCE & ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

THE ADMIRALTY *v.* OWNERS OF THE STEAMSHIP
DIVINA AND OTHERS.
THE TRUCULENT.

1951
Oct. 3, 4,
5, 22.

Willmer J.

Shipping—Collision—Negligence admitted by both vessels—Claims for damage and loss of life—Limitation of liability by H.M. Submarine—Navigation lights not in compliance with article 2 (a) of the Regulations for Preventing Collisions at Sea incorporated in King's Regulations and Admiralty Instructions—Actual fault or privity of owner—Duties of Board of Admiralty and responsible Sea Lord—"His Majesty" not used in personal sense—Crown Proceedings Act, 1947 (10 & 11 Geo. 6, c. 44), ss. 1, 5 (1)—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 419, 503 (1) and 741.

Followed. BEAU-
CHAMP *v.* TURRELL
[1952] 2 Q.B. 207

By virtue of section 5 (1) of the Crown Proceedings Act, 1947, applying the provisions of section 503 of the Merchant Shipping Act, 1894, the Admiralty, on behalf of His Majesty, sought to limit liability in respect of claims for damage, including loss of life, which arose out of a collision which occurred in January, 1950, between H.M. Submarine *Truculent* and the Swedish steamship *Divina* during the hours of darkness. *H.M.S. Truculent* was sunk and sixty-four persons on board her lost their lives, among them a number of civilian personnel whose personal representatives made claims against the Admiralty. It was agreed between the Admiralty

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and the owners of the *Divina*, that *H.M.S. Truculent* was three-quarters and the *Divina* one-quarter to blame for the collision. In the present action for limitation of liability the Admiralty admitted negligence in the navigation of *H.M.S. Truculent*, but pleaded that the collision was caused without the actual fault or privity of His Majesty or of the Admiralty. It was established in evidence that the steaming light exhibited by *H.M.S. Truculent* at the time of the collision was not placed so as to comply with chapter XVI, para. 660, of the King's Regulations and Admiralty Instructions (which is in the same terms as article 2 (a) of the Regulations for Preventing Collisions at Sea) in that it was neither carried in the fore part of the vessel, nor at the required height above the hull of the vessel. There was evidence that it had been found impracticable in submarines to fit such a light in the correct position without interfering with their operational efficiency and their safety. It was admitted by the Third Sea Lord, the responsible member of the Board of Admiralty, that he was aware that the steaming light in such class of submarines did not conform exactly to the Regulations.

On the question whether the collision occurred without the actual fault or privity of His Majesty:—

Held, (1) that there was a "fault" in relation to the lights exhibited by *H.M.S. Truculent*; (2) that such fault contributed to the loss and damage complained of; (3) that the fault, being that of the Third Sea Lord, the member of the Board of Admiralty charged with the responsibility for construction and maintenance, was that of a person whose fault defeated the claim put forward on behalf of His Majesty for limitation of liability.

ACTION.

The Admiralty claimed by virtue of section 5 (1) of the Crown Proceedings Act, 1947,¹ a declaration of limitation of liability under the Merchant Shipping Act, 1894,² in respect of claims

¹ Crown Proceedings Act, 1947, s. 5 (1): "The provisions of the Merchant Shipping Acts, 1894 to 1940, which limit the amount of the liability of the owners of ships shall, with any necessary modifications, apply for the purpose of limiting the liability of His Majesty in respect of His Majesty's ships; and any provision of the said Acts which relates to or is ancillary to or consequential on the provisions so applied shall have effect accordingly."

² Merchant Shipping Act, 1894, s. 503 (1): "The owners of a ship, British or foreign, shall not where all or any of the following occurrences take place without their actual fault or privity; (that is to say,)—(a) Where any loss of life

"or personal injury is caused to any person being carried in the ship; (b) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship . . . ; (d) Where any loss or damage is caused to any other vessel or to any goods, merchandise or other things whatsoever on board any other vessel by reason of the improper navigation of the ship; be liable to damages beyond the following amounts; (that is to say,)—(i) In respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise or other things, an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage."

arising out of a collision between H.M. Submarine *Truculent* and the steamship *Divina* which occurred during the hours of darkness on January 12, 1950, in the Thames estuary as a result of which the *Truculent* sank and sixteen members of the civilian personnel and forty-eight members of the naval personnel lost their lives. On August 4, 1950, the question of liability was settled as between the Admiralty and the owners of the *Divina* on the basis of 75 per cent. of blame being attributed to the *Truculent*, and 25 per cent. of blame to the *Divina*. In 1950, Queenie Kathleen Violet Alexander, Frances Lilian Tester, Catherine Theresa McLaughlin, Louisa Lloyd Edwards, Violet Evelyn Austin, Jean Daphne Melville and Joan Gertrude Emma Adlam Barnden, claimed against the Admiralty compensation in respect of the death of their respective husbands who were some of the civilians among those who lost their lives in the *Truculent*. The owners of the *Divina* and the legal representatives of other members of the civilian personnel on board the *Truculent* entered appearances against the claim of the Admiralty to limit their liability. The Admiralty admitted that the said collision, and the damages and loss in consequence of it, was caused or contributed to by the negligent navigation of the *Truculent*. The tonnage of the *Truculent*, ascertained in accordance with the provisions of the Crown Proceedings Act, 1947, s. 5 (5) (a), being the gross tonnage of the *Truculent* less 10 per cent., was 416.40 tons, and the amount of the liability of the Admiralty calculated at £8 per ton was £3,331 4s. 0d. and calculated at £7 per ton £2,914 16s. 0d., making an aggregate sum of £6,246.

At the time of the collision the *Divina* was exhibiting mast-head and side lights, and, in addition, being laden with an inflammable cargo, was exhibiting a red light in compliance with the Petroleum Spirit in Harbours Order, 1939 (S. R. & O., No. 1180). The *Truculent* was exhibiting a white steaming light, mounted on top of the periscope housing above the conning tower, side lights and an overtaking light. The *Divina* was in charge of a compulsory pilot; the *Truculent* had no pilot on board, His Majesty's ships not being subject to compulsory pilotage.

On behalf of the *Divina* it was not admitted that the damage occurred without the actual fault or privity of the Crown. On behalf of certain of the civilian claimants in addition to such non-admission it was expressly pleaded that the *Truculent* was exhibiting lights which did not comply with King's Regulations and that the *Divina* was misled by those lights.

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In this and other respects which are fully dealt with in the judgment it was contended that there were breaches of duty on the part of the Admiralty which caused or contributed to the collision or to the loss of life which resulted therefrom.

J. V. Naisby K.C. and *W. Porges* for the Admiralty. This is the first case where the question to be considered is the "actual fault or privity" of the Crown, who now seek to limit liability under the Crown Proceedings Act, 1947, and whose fault or privity is necessary to disentitle the Crown to limit liability where damage has been done by one of His Majesty's ships as a result of which there has been a loss of life, and where negligence on the part of His Majesty's ship has been admitted.

[WILLMER J. If there is to be a question of "fault or privity," was it the fault or privity of the whole Board of Admiralty, or would it be the fault or privity of some particular member of the Board, or some less senior person who was responsible to the Board? What does the statute mean by "His Majesty"? A corporation is an abstraction not having a mind of its own; that cannot be said of His Majesty. Part of that mind are the several Ministries which manifest the mind of His Majesty. Such is the Admiralty, which has particular functions and responsibilities.]

There are three questions to be considered: (1) was there fault or privity? If so, (2) did it contribute to the collision or damage, and (3) was it the fault or privity of someone disentitling His Majesty to limit his liability. The faults alleged against *Truculent* can be divided into three classes relating to (1) lights, (2) warnings, (3) the competence of those in charge. As to the lights it is admitted that the masthead light was not placed as required by the Regulations for Preventing Collisions at Sea. But the Merchant Shipping Act, 1894, which makes these Regulations binding upon a private owner, does not bind the Crown. The collision regulations are only applied to His Majesty's ships by King's Regulations and Admiralty Instructions as a domestic matter of departmental discipline.

The evidence establishes that it is impracticable for a submarine to be lighted in accordance with the collision regulations without impairing its efficiency. There is therefore no fault in respect of the masthead light. The remaining faults must be, if faults at all, those of subordinates whose faults would not affect the right to limit liability. On the facts the position of the

masthead light did not contribute to either the collision or the damage.

As to whose fault or privity is required to disentitle His Majesty to limit his liability the Crown places the facts before the court. It must be the "alter ego" of His Majesty but that person may vary according to the particular circumstances of each case. There is no direct authority, but in *Lennards' Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*³ the principles were discussed.

H. E. G. Browning for the owners of the *Divina*. This was just a normal action for the limitation of liability under section 503 (1) of the Merchant Shipping Act, 1894, and it is submitted that the Crown has not proved that the collision was not caused by any actual fault or privity on the part of the Crown, the onus of which is on the Crown.

D. A. Scott Cairns K.C. and *Knox Cunningham* for some of the life claimants. "Actual fault or privity" is a breach of duty by somebody. Where a duty lies only on a servant the breach of that duty is not "actual fault or privity" of the master, though he may be liable on the principle of respondeat superior; but where the duty lies on the master, failure to comply with it is his breach and therefore his actual fault. In *Cassidy v. Ministry of Health*,⁴ Denning L.J. said⁵: "I take it to be clear law, as well "as good sense, that where a person is himself under a duty to "use care, he cannot get rid of his responsibility by delegating "the performance of it to someone else, no matter whether the "delegation be to a servant under a contract of service or to an "independent contractor under a contract for services." So in *Standard Oil Co. of New York v. Clan Line Steamers Ltd.*⁶ it was held that shipowners did not perform their duty by delegating it.

Where a duty is imposed by statute on an employer, failure to comply with the duty constitutes "personal negligence" of the employer even though he has delegated performance to a responsible person. "Actual fault or privity" is equivalent to "personal negligence." The same considerations apply to a duty imposed by King's Regulations. It is submitted that in the present case it is unnecessary for the court to consider who is directly responsible for the lights of the submarine. The duty is on the Crown represented in Admiralty matters by the Board of Admiralty. For the Board to delegate that duty is not enough to relieve from liability for the failure of the duty by the person to whom it is delegated. All that is material to this case is

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³ [1915] A.C. 705.

⁴ [1951] 2 K.B. 343.

⁵ *Ibid.* 363.

⁶ [1924] A.C. 100.

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whether proper lights were being exhibited by the *Truculent*. The duty is equivalent to a statutory one and, automatically, breach of a statutory duty establishes "actual fault or privity" on the part of the owners (the Crown). In the case of the ordinary shipowner who failed to supply efficient lights there can be no question that he would be in breach of a statutory duty.

[WILLMER J. There is no doubt in that case that there is a statutory duty of a shipowner to furnish his ship with efficient lighting system, but can the same be said in relation to the Crown?]

On the pleadings as they stand it is not open to the Crown to say that the collision regulations do not apply to the Crown. Even if it were open it would be unsound. The collision regulations are binding on everybody within the Admiralty, including the Board of Admiralty. It is sufficient to say that the regulations have been made applicable to Admiralty ships and have not been altered. The Admiralty have supplied lights but have failed to provide proper positions for those lights. That establishes actual fault or privity on the part of the Admiralty, for they made it impossible for those lights to be put in the positions laid down by the collision regulations. The duty is absolute. If not absolute it must be established that it was impracticable to comply with the regulations.

Analogy cannot be drawn between the responsibility of a board of directors in a commercial undertaking and the Board of Admiralty.

[WILLMER J. The question is whether the failure to provide lights which complied with the regulations is the act of the Crown.]

If the failure to provide efficient lights was not the fault or privity of the Crown, then the failure to give warning notice to mariners that the lights did not comply with the regulation was sufficient to defeat the normal right of the Admiralty to the limitation of their liability. It is submitted that the declaration asked for by the Admiralty should not be granted.

D. A. Scott Cairns K.C. and P. Bucknill for some other of the life claimants.

Knox Cunningham, P. Bucknill, Derek H. Hene and A. L. J. Lincoln for others.

J. V. Naisby K.C. replied.

Cur. adv. vult.

WILLMER J. read the following judgment:—At about 7.0 p.m. on January 12, 1950, a collision occurred in the Thames Estuary, near the South Oaze Buoy, between H.M.S. *Truculent*, inward bound from sea to the Medway, and the Swedish steamship *Divina*, outward bound from the Thames. Both vessels were damaged, and the *Truculent* sank almost at once, unhappily with the loss of sixty-four lives of her total complement of seventy-nine. As between the Admiralty and the owners of the *Divina* the question of liability for the collision was settled by agreement on the basis that both vessels were to blame, the *Truculent* to the extent of 75 per cent. and the *Divina* to the extent of 25 per cent. A number of actions have been instituted against the Admiralty on behalf of the personal representatives and dependants of men who lost their lives in consequence of the collision, and in these actions liability has been admitted on behalf of the Admiralty.

The present action is brought by the Admiralty, as the authorized Government department for instituting civil proceedings on behalf of the Crown, for the purpose of obtaining a declaration of limitation of liability, in pursuance of section 5 (1) of the Crown Proceedings Act, 1947, in respect of the claims for damage, including claims for loss of life, arising out of the collision. No question of quantum arises, it being agreed by all parties that, if the Admiralty are entitled to limit their liability, the tonnage of H.M.S. *Truculent*, calculated in accordance with section 5 (5) (a) of the Act, is 416.40 tons, so that the total fund, on the basis of £15 per ton, would be £6,246.

The owners of the *Divina* have taken no part in the proceedings before me, except to put the plaintiffs to proof of the tonnage of the *Truculent*. The claim of the Admiralty to limit their liability has, however, been contested by a number of the life claimants, on the ground that the damage is not shown to have occurred without the actual fault or privity of the Admiralty.

I have found the task of deciding this issue one of more than usual anxiety, and for two reasons. In the first place, I cannot help being impressed by the very grave consequences to the various claimants, especially the life claimants, having regard to the size of the fund that would be available, if the claim of the Admiralty to limit their liability succeeds. Secondly, so far as I am aware, this is the first case of its kind that has arisen since the Crown Proceedings Act, 1947, came into force, and it has been necessary to consider for the first time, without the guidance of decided authority, the scope and meaning of the phrase “ actual

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“ fault or privity ” of the owner in relation to a claim arising in respect of one of His Majesty’s ships.

Before stating the issues which fall to be determined, it will be desirable to recite in outline the facts relating to the collision. The collision occurred at night time, and both vessels were exhibiting lights. The *Divina* was exhibiting masthead and side lights, and in addition, being laden with an inflammable cargo, was exhibiting a red light in accordance with section 4 of the Petroleum Spirit in Harbours Order, 1939 (S. R. & O., 1939, No. 1180). The *Truculent* was exhibiting a white steaming light, mounted on top of the periscope housing above the conning tower, and also side lights mounted on each side of the conning tower. The weather was clear but very dark, and the tide was ebb. The vessels sighted each other at a distance of two or three miles, the *Truculent* having the *Divina* nearly ahead and the *Divina* having the *Truculent* on her port bow. At the time of first sighting, the *Divina* was approaching the West Oaze Buoy, and the *Truculent* was in the vicinity of the South Oaze Buoy. The vessels were on courses which intersected at a fine angle. At the West Oaze Buoy it was necessary for the *Divina* to make an alteration of course to port in order to follow the line of the channel, but owing to the presence of the *Truculent* she made a smaller alteration than would ordinarily be made at that point. In the result the vessels remained on courses which intersected, but at a still finer angle. It is not necessary for me to determine whether in this situation the crossing rules applied, or whether it was the duty of the vessels to navigate in accordance with the narrow channel rule. In either case it is clear that the navigation of both vessels was at fault. The *Truculent* twice altered course to port, on neither occasion sounding any whistle signal, and it was only at the last, when the vessels were within about two cables of each other, that she made any attempt to take off her speed. The *Divina*, purporting to act under the note to art. 21 of the Regulations for Preventing Collisions at Sea, kept her course and speed until the vessels were very close to each other, when, at the last moment, she took violent action by altering course hard-a-starboard, without making any attempt to take off her way. The collision followed almost immediately, at a broad angle, the stem and starboard bow of the *Divina* striking the starboard side of the *Truculent* well forward of amidships.

Those in charge of each vessel claim to have been misled by the lights of the other. The commanding officer of the *Truculent* failed to recognize the red light at the masthead of the *Divina*

as signifying that she was carrying petroleum spirit. He appears to have thought that she was some kind of mooring vessel, and until a very late moment he says that he was under the impression that she was lying stationary on the north side of the channel. Only at the last did he realize that the *Divina* was in fact under way and approaching at speed with risk of collision. Those in charge of the *Divina* thought that the *Truculent* was an extremely small vessel, such as a motor launch or yacht, or perhaps a small tug, and acted accordingly. The only lights visible, namely, the green and white, appeared very close together and both very low, giving the impression that the approaching vessel was something very small. The pilot of the *Divina* says that if it had been a small vessel, such as he thought, the action which he took would have been sufficient to clear her, and he explained—as must indeed have been the fact—that even at the moment of collision the lights of the submarine were still well on his port bow.

After the collision the *Truculent* sank almost at once, most of those on board her being, of course, trapped below. It appears, however, that many of those who were below succeeded in fact in escaping to the surface. But, most unhappily, very few were picked up. The *Divina* lowered a boat, and cruised in the vicinity for a matter of some hours. Valuable assistance was also rendered by a small Dutch vessel, which happened to be in the neighbourhood and which succeeded in rescuing a number of men. The explanation put forward by the pilot and master of the *Divina* for the small number of survivors picked up is that, even after the collision, their belief that the vessel they had struck was something very small persisted for a very considerable time. Consequently, when it was seen shortly after the collision that the Dutch vessel had picked up such men as had been observed in the water, it was thought at first that the whole complement had probably been accounted for. Accordingly, when the lifeboat of the *Divina* returned without having picked up anybody else, it was hove on board. Later, cries for help were heard from other men still in the water. The boat was then lowered again, and succeeded in picking up several men, and a few others were rescued by means of lines thrown from the *Divina*. Only when these survivors came on board the *Divina* was it learnt that the other vessel was a submarine with a large complement on board. It is suggested that, if it had been realized on board the *Divina* that she was in the presence of a vessel of the size of a submarine, not only would the collision itself have been avoided, but a more

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sustained effort at saving life would have been made, with the probable result that much loss of life would have been avoided.

The complaints made on behalf of the defendant life-claimants, from which I am invited to infer fault or privity on the part of the Admiralty, may be summarized as follows: (1) It is alleged that the lights exhibited by the *Truculent* were not in accordance with the regulations, but were so placed that they were liable to mislead, and did in fact mislead, those in charge of the *Divina*. (2) That no notice was ever given by the Admiralty warning mariners that His Majesty's submarines might be found navigating on the surface at night with lights which did not comply with the regulations. (3) That no notice was given by the Admiralty that on the particular date the *Truculent* or any submarine would be navigating on the surface at night in the Thames Estuary. (4) Lastly, complaint is made that the *Truculent* was allowed to navigate in an area of compulsory pilotage for merchant vessels without carrying a duly licensed pilot, and in charge of an officer who was not sufficiently familiar with local conditions or with the local rules relating to the lights to be exhibited by petroleum ships.

The last two matters of complaint can be quickly disposed of, because in my judgment there is no substance in either of them. With regard to the failure to engage a pilot, it must be remembered that His Majesty's ships are not subject to compulsory pilotage. The instructions issued by the Admiralty in relation to pilotage are contained in the King's Regulations and Admiralty Instructions, c. XXXIII, s. II, para. 1179. From these it is clear that the commanding officer of one of His Majesty's ships is not expected to take a pilot, except for ports and channels which are difficult of access, or for which the charts are not a sufficient guide. In the case of a port for which the charts and directions are a sufficient guide a pilot is not to be taken; an officer engaging a pilot for such a port is required to furnish an explanation of his reasons and, if his explanation is not considered satisfactory, the expense may be charged against him. I imagine that the Thames Estuary might fairly be classed as an area for which the charts and directions are a sufficient guide. The evidence shows that the *Truculent* had been provided by the Hydrographic Department with a full set of the necessary charts and directions. She was commanded by a competent officer, who possessed a watch-keeping certificate and had had watch-keeping experience, as indeed he must have had in order to obtain his rank. He had had previous experience of navigating his

submarine in and out of the Thames Estuary by night. In these circumstances it came as a surprise to me to hear that an officer of such experience did not recognize the red light of the *Divina* as the light of a vessel carrying petroleum spirit. But if he did not know what the light signified, he had on board his vessel the necessary publication from which he could have informed himself—namely the North Sea Pilot, Part III. I cannot think that the failure of this particular officer to recognize this particular light on this particular occasion is a sufficient reason why I should say that a submarine, such as the *Truculent*, when entering the Thames Estuary by night, ought to engage a licensed pilot. Even if I thought so, it is clear that in the last resort the decision whether or not to engage a pilot on any particular occasion is, and must be, that of the commanding officer of the vessel concerned, who, by the King's Regulations, clearly has a discretion to do so, subject to his furnishing an explanation to his superiors. If there was a fault in failing to take a pilot in this case—and I am far from saying that there was—the fault was that of the commanding officer, and was certainly not that of any person whose fault could possibly be held to defeat His Majesty's claim for limitation of liability. Certainly I do not see how the Admiralty, having appointed a commanding officer of the necessary qualifications and experience, and having supplied him with the necessary charts and publications, could properly be held privy if that officer committed a fault in failing to take a pilot when he ought to have done.

The complaint of failure to give notice that on this particular occasion a submarine would be navigating on the surface in the Thames Estuary by night seems to me to be of no greater substance. I am far from satisfied that anybody was in fact at fault for failing to give any such notice. The evidence shows that it has never been the practice to issue warning notices of that nature. If a notice ought to have been given in this case, presumably a similar notice ought to be given on every occasion when one of His Majesty's submarines puts to sea in circumstances when she is likely to be found navigating on the surface by night. I can well understand that the issue of special notices on such a scale would go far beyond anything which is practically possible. But the short answer to this complaint is that, if such a notice ought to be given, the responsibility for issuing it must rest with the local commander—who in this case, I am told, would be the Commander-in-Chief, Nore. His fault (if he was guilty of any) in failing to issue a special notice would not be the fault of the

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Admiralty. It has not been argued, and I do not see how it could successfully be contended, that fault or privity on the part of a local commander, however senior in rank, would be such as to defeat His Majesty's claim for limitation of liability.

It remains then to consider the complaints that the lights of the *Truculent* were not in accordance with the regulations, and that no notice was ever issued by the Admiralty warning mariners that the lights of His Majesty's submarines were not in accordance with the regulations. These two matters of complaint are clearly inter-related, and can be considered together, for both must depend on whether there was in fact any fault in relation to the lights of the *Truculent*. I agree with the submission of counsel for the Admiralty that three separate questions fall to be considered, namely: (1) Was there in fact any fault? (2) If so, did that fault contribute to the loss and damage brought about by the collision? (3) If there was a fault which contributed, was that a fault on the part of any person or persons whose fault or privity would defeat His Majesty's claim for limitation of liability?

As to the first of these questions, the Regulations for Preventing Collisions at Sea provide, by art. 2 (a), that a steam vessel under way shall carry the white light (herein referred to as the "steaming" light) (I shall be using that expression throughout the rest of my judgment as a matter of convenience)—(a) in the fore part of the vessel and (b) at a height above the hull of not less than 20 feet, and if the breadth of the vessel exceeds 20 feet, then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than 40 feet. The steaming light carried by the *Truculent* satisfied neither of these requirements. In the first place, it was carried almost exactly amidships—certainly not in a position that could fairly be described as in the fore part of the vessel. Secondly, although the breadth of the *Truculent* is given as 26 feet 5½ inches, the steaming light was only about 16 feet above the line of the casing top, and only 23 feet 5 inches above the water line. In the result the steaming light and the side lights were very close together, both horizontally and vertically, the vertical distance of the steaming light above the side lights being something less than 9 feet, and all the lights were very low.

By section 419 of the Merchant Shipping Act, 1894, all owners and masters of ships are required to obey the collision regulations. By section 741 of the Act, however, His Majesty's ships are specifically exempted from the operation of the Act. It cannot be contended, therefore, that the lights of the *Truculent* constituted

any breach of statutory duty under the Merchant Shipping Act. But by chapter XVI of the King's Regulations and Admiralty Instructions, regulations in identical terms with the collision regulations are applied to His Majesty's ships. Not only does para. 660 open with the imperative words, "The following regulations are to be observed in order to prevent collisions at sea," but the volume containing the King's Regulations and Admiralty Instructions includes a preamble, issued on the authority of the Lords Commissioners, in the following terms: "The Regulations and Instructions contained in this volume and in volume II (which are to be designated the King's Regulations and Admiralty Instructions), for the government of His Majesty's Naval Service, having been established by His Majesty's Order in Council, we do hereby require and direct you to observe and obey the same, and to take care that the several officers and others under your command also pay the most strict attention and obedience thereto."

On behalf of the plaintiffs it was contended that the King's Regulations and Admiralty Instructions apply to His Majesty's ships only as a matter of departmental discipline, that they are only instructions issued by the Admiralty to their own subordinates, and that they cannot be held to impose on the Admiralty any duty towards those in charge of other vessels. The maximum obligation on the Admiralty, it is urged, in relation to the fitting of lights in His Majesty's ships, is to do what is reasonably practicable to conform as closely as possible with the regulations, having regard to the peculiarities and characteristics of the particular ship concerned. Evidence of great weight and authority was given to prove that it would be practically impossible in the case of a submarine to fit a steaming light conforming exactly with the requirements of art. 2 (a) of the collision regulations, without impairing the safety and operational efficiency of the vessel. I need not describe in detail what the practical difficulties would be, for I fully accept the evidence that was given, and I am prepared to assume that the difficulties of complying strictly with the regulations would be great, if not insuperable. I was informed, and I am prepared to accept, that the positioning of the lights is similar in others of His Majesty's submarines, and indeed in those of other Navies.

In my judgment these considerations afford no answer to the charge that the steaming light of the *Truculent* constituted a breach of the regulations. Nor can I accept the argument that breach of the regulations on the part of one of His Majesty's

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ships is only a matter of departmental discipline. In my judgment such a breach is a breach of the duty owed by His Majesty's ships to other mariners. The King's Regulations and Admiralty Instructions are not only issued to the officers of His Majesty's ships, but they are also published to the world at large. A copy of the volume may be purchased at His Majesty's Stationery Office, and it is a matter of common knowledge amongst seafarers that His Majesty's ships are required to obey the collision regulations. By publishing the King's Regulations and Admiralty Instructions it seems to me that the Admiralty have accepted on behalf of His Majesty's ships the same duty to obey the collision regulations as is imposed on other vessels, and I do not see how a breach of that duty is to be excused merely because it is practically difficult to comply with this or that requirement. If the argument on behalf of the plaintiffs is well founded, it would be possible for the Admiralty to evade any liability, even for the most flagrant breach of the steering and sailing rules on the part of the officer in charge of one of His Majesty's ships, for it would always be open to them to say that the breach was a mere matter of departmental discipline, and constituted no breach of duty to the world at large.

If it really is impossible, in the case of a submarine, to fit a steaming light that will comply with the regulations, it seems to me that at the least a duty arises to issue a notice warning other mariners of this fact. It is conceded that up to the time of this collision no such notice was issued by the Admiralty. A notice to mariners was issued, and repeated annually, giving warning of the possibility of meeting submarines submerged, and describing the signals used to denote their presence. But no notice was issued relating to submarines navigating on the surface by night. After the date of this collision a notice to mariners, No. 869 of 5/5/1950, in the following terms, was issued: "Warning to "Mariners. Submarines—Navigation Lights. Submarines may "be met on the surface by night, particularly in the vicinity of "the following ports: Thames Estuary, Portsmouth, Portland, "Plymouth, Barrow, Liverpool, Londonderry and Clyde Areas. "By virtue of the construction of a submarine the only position "from which navigation lights can be exhibited is the conning "tower of the vessel and this is approximately in the centre of "her length. For the same reasons of construction it is imprac- "ticable for a submarine to show the second white steaming "light prescribed in art. 2 (b) of the Regulations for Preventing "Collisions at Sea, although submarines may vary in length from

" 215 feet to 280 feet. The single steaming light and bow lights " are necessarily low down and closely spaced and give no " indication of the submarine's length nor of her exact course or " change of course. They may be mistaken for the lights of " a very much smaller vessel of the coastal type. Authority—" Admiralty." I am informed that a notice combining a warning in substantially similar terms with that contained in the previous notice already referred to has been issued during 1951.

It is unnecessary for me to decide—and I purposely refrain from deciding—whether the issue by the Admiralty of these more recent notices is sufficient to cure the non-compliance by most, if not all, of His Majesty's submarines with art. 2 (a) of the collision regulations, relating to the position of the white steaming light. What I do decide is that, in the absence of any such notice up to the date of this collision, the breach of that article by the *Truculent* constituted a breach of the duty which she owed to other vessels such as the *Divina*. Accordingly I conclude that in this case there was a " fault " in relation to the lights exhibited by the *Truculent*.

Did that fault, then, contribute to the loss and damage brought about by the collision? Those in charge of the *Divina* claim that they were in fact misled into thinking that the lights of the *Truculent* were those of a very small vessel, and they say that but for this mistake they would have taken other measures, which would, or would probably, have avoided the collision, and which might at the worst have resulted in considerably less loss of life. The notice to mariners (No. 869 of 1950), which I have just read, contains an admission on behalf of the Admiralty that the lights of a submarine may be mistaken for those of a very much smaller vessel of the coastal type. I should be the last person to hold anybody bound by such an admission made in such circumstances. But the same admission was made in evidence by Vice-Admiral Sir Michael Denny, the Third Sea Lord and Controller of the Navy, and also by Lieut.-Commander Bowers, the officer in command of the *Truculent*. For what my own opinion is worth, I should, without assistance, have arrived at the same conclusion myself. But I have thought it right to consult the Elder Brethren on this point, and they also have expressed the opinion that lights such as those carried by the *Truculent* would indeed be liable to be mistaken for those of a very small vessel. Having seen the pilot of the *Divina*, and heard him cross-examined, I have no hesitation in accepting his evidence that he was in fact misled. To my mind the behaviour of the *Divina* after the collision is only

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consistent with the hypothesis that, as stated by the pilot and the master, those in charge of her remained even then in ignorance of the fact that they had collided with a vessel of the size of a submarine. I am forced, therefore, to the conclusion that the lights carried by the *Truculent* were not only liable to mislead, but did in fact mislead, those in charge of the *Divina*. I see no reason to reject the evidence of the pilot of the *Divina* that, but for his belief that he was meeting a very small vessel, his action would have been different. Had he realized that he was in fact in the presence of a large vessel, he could have taken earlier and perhaps different action. Had he done so, the collision might well have been avoided altogether. In any case a different collision would have resulted, and the disastrous consequences of this collision might quite probably have been avoided.

It may be said, however, that notwithstanding the faulty lights of the *Truculent*, those in charge of the *Divina* ought not to have been misled, and would not have been misled but for their own negligence and faulty look-out, so that the faulty lights of the submarine cannot in law be said to have contributed to the loss and damage. Such a proposition would, in my judgment, be inconsistent with authority by which I am bound. A somewhat similar situation arose in the case of *The Eurymedon*,⁷ where a vessel at anchor in the River Thames was negligently allowed to lie athwart the main fairway in such a position that her anchor lights were liable to confuse and mislead vessels passing up and down the fairway. The *Eurymedon*, navigating up-river, was in fact misled, and a collision resulted. Bucknill J. and the Court of Appeal decided that the *Eurymedon* was keeping a defective look-out, but for which she would not have been misled by the lights of the vessel at anchor, but notwithstanding this came to the conclusion that the negligence of the vessel at anchor contributed to the collision, and pronounced both vessels to blame. In the Court of Appeal, Greer L.J., in the course of a judgment which has twice been cited with approval in the House of Lords, stated the law of contributory negligence applicable to such a state of facts in five propositions, the fifth of which was as follows⁸: "If the negligent act of one party is such as to cause "the other party to make a negligent mistake that he would not "otherwise have made, then both are equally to blame." This proposition appears to me to apply exactly to the facts of the present case. Let it be assumed, without deciding, that those in charge of the *Divina* made a negligent mistake, and that they

⁷ [1938] P. 41.

⁸ Ibid. 50.

would not have been misled by the lights of the *Truculent* but for a defective look-out on their own part. Nevertheless it remains true to say that the fault of the *Truculent* in exhibiting misleading lights was such as to cause the negligent mistake of the *Divina* that she would not otherwise have made. I do not see how it is possible, therefore, to avoid the conclusion that this fault on the part of the *Truculent* contributed to the loss and damage here complained of.

I come, therefore, to the third and most difficult question, namely, whether the fault of the *Truculent* in exhibiting misleading lights was a fault on the part of any person or persons whose fault or privity would defeat His Majesty's claim for limitation of liability. On behalf of the defendants an attractive argument was presented to me, which, if I accepted it, would relieve me from the necessity of deciding this difficult question. Reliance was placed on the doctrine that where the law imposes an absolute duty of care on some person, that person cannot escape his responsibility by delegating the performance of that duty to someone else: see the observations of Denning L.J. in the recent case of *Cassidy v. Minister of Health*.⁹ The argument ran somewhat as follows. By section 419 of the Merchant Shipping Act, 1894, a statutory duty to obey the collision regulations is imposed on both owners and masters of ships. In so far as the regulations relate to the equipment of the ship, for instance, with proper lights and sound-signalling apparatus, they impose an absolute duty on the owner, who cannot evade his responsibility by delegating its performance. So, when by Order in Council the collision regulations were applied to His Majesty's ships, not only was a duty imposed on the officers in charge of His Majesty's ships to obey the steering and sailing rules, but the Admiralty, on behalf of His Majesty, must be taken to have accepted an absolute obligation in the matter of equipping His Majesty's ships, for instance, with proper lights. Responsibility for the performance of that obligation cannot, it is said, be evaded by delegation. Consequently, it is not necessary, in the case of one of His Majesty's ships, to do more than prove that the lights were not in accordance with the regulations, in order to show that the Admiralty were in breach of an absolute duty accepted by them on behalf of His Majesty. In such a case, therefore, it is impossible to establish absence of actual fault or privity so as to entitle His Majesty to a decree of limitation. I was invited to say that, just as in *Lochgelly Iron and Coal Co. Ltd. v. McMullan*,¹⁰ the

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⁹ [1951] 2 K.B. 343, 363.

¹⁰ [1934] A.C. 1.

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breach by colliery owners of their statutory duty under the Coal Mines Act, 1911, was held to amount to "personal negligence or "wilful act" on their part for the purposes of the Workmen's Compensation Acts, so also in this case the breach by the Admiralty of their obligation to obey the collision regulations, so far as these relate to the fitting of lights, should be held to amount to "actual fault or privity."

In my judgment this argument fails because the conclusion contended for does not follow from the premise. Let it be assumed that in the matter of the provision of lights section 419 of the Merchant Shipping Act, 1894, imposes on shipowners an absolute obligation, responsibility for the performance of which they cannot evade by delegation. Let it further be assumed that by publishing the King's Regulations and Admiralty Instructions the Admiralty have accepted, on behalf of His Majesty, a similar absolute obligation. It may well be true that in an action for damage caused by defective lights neither the owners of a merchant ship nor the Admiralty could successfully evade liability on the footing that they had delegated their duty to provide lights in accordance with the regulations to some competent person. But this goes only to liability, which is not in issue in the present case. The question of limitation only arises after liability has been determined, and it by no means follows that because liability cannot be evaded the right of limitation is lost. If the proposition contended for by the defendants were well founded, it would never be possible for shipowners to limit their liability where loss or damage has been caused or contributed to by defective lights, or other defective equipment, in their ships. Yet many cases are to be found in the Law Reports in which, in such circumstances, shipowners have been able to satisfy the court of absence of fault or privity on their part, and have been held entitled to limit their liability. (See, for instance, *The Warkworth*,¹¹ a decision of the Court of Appeal.)

I do not think, therefore, that it is possible to contend that the mere proof of defective lights on board the *Truculent* is sufficient of itself to prevent the Admiralty, on behalf of His Majesty, from establishing absence of fault or privity. I do not see that this conclusion is inconsistent with anything that was said in *Standard Oil Company of New York v. Clan Line Steamers Ltd.*,¹² to which I was referred by the defendants. In that case, the facts of which were very special, shipowners allowed their ship to put to sea without informing the master of certain

¹¹ (1884) 9 P.D. 20, 145.¹² [1924] A.C. 100.

peculiarities of the ship in relation to the filling of her tanks. The owners knew of these peculiarities, but the master did not. The master's lack of knowledge rendered the ship unseaworthy, and a loss occurred. In these circumstances it was held that the owners were not entitled to limit their liability, because they could not discharge the burden of showing that the loss occurred without their actual fault or privity. The fact that they had informed their engineer superintendent of the ship's peculiarities did not help the owners; they had not informed the master, and it was the master's ignorance that was the cause of the ship's unseaworthiness. I do not read this decision as any authority for the proposition that where shipowners delegate the performance of a duty imposed on themselves they can in no case limit their liability.

It seems to me that, in order to decide this case, it is necessary to examine with care, in the light of the provisions of the statute conferring the right of limitation, the actual facts which have been proved in evidence. The wording of section 5 (1) of the Crown Proceedings Act, 1947, is as follows: "The provisions of the Merchant Shipping Acts, 1894 to 1940, which limit the amount of the liability of the owners of ships shall, with any necessary modifications, apply for the purpose of limiting the liability of His Majesty in respect of His Majesty's ships." Section 503 of the Merchant Shipping Act, 1894, must, therefore, now be read as providing that His Majesty may limit his liability where the loss takes place without His Majesty's actual fault or privity. It is obvious that in this context the expression "His Majesty" is not used in any personal sense, for otherwise it would be impossible to conceive of any case in which the right to limitation of liability could possibly be disputed. Clearly the expression is used in a corporate sense, and this is recognized in the statement of claim when it alleges that His Majesty sues in the name of the plaintiffs, the Admiralty, as the authorized Government Department for instituting civil proceedings by the Crown in relation to one of His Majesty's ships. The question must, therefore, be approached on the footing that the Admiralty are in the position of owners of the *Truculent*, and the claim in this action must succeed or fail according as the Admiralty does or does not satisfy the court that the loss occurred without their actual fault or privity. In order to determine what is meant by actual fault or privity on the part of the Admiralty, it is necessary, I think, to examine the constitution of the Admiralty. As I understand the position, the control of the department is vested

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in the Board of Admiralty, presided over by His Majesty's Minister, the First Lord of the Admiralty, and including amongst its members the several Sea Lords. Members of the Board, in addition to their collective responsibility for the decisions of the Board as a whole, have within their own respective provinces what I may describe as certain functional responsibilities, in the sense that they are empowered to act and issue orders in the name of the Board. The member of the Board with whom we are chiefly concerned in this case is the Third Sea Lord and Controller of the Navy. I received some very helpful and informative evidence from Vice-Admiral Sir Michael Denny, the present holder of that office, who explained that the functional responsibilities of the Third Sea Lord include the following: design, construction, repair and maintenance of His Majesty's ships and aircraft, provision of warlike stores, supervision of establishments, and research in the Navy. He accepted that a matter such as the provision of proper lights in one of His Majesty's vessels would be one that came within his province.

It appears to me that there is an analogy between the constitution and functions of the Board of Admiralty and those of the board of directors of a limited company. Just as a limited company acts and transacts its business through its board of directors, so His Majesty, in relation to His Majesty's ships, acts through the Board of Admiralty. Again, just as in the case of some companies an individual member of the board may be authorized to act in the name of the board, so that his act is in law the act of the company, so also in the case of the Admiralty an individual member of the board may act in the name of the board as a whole. The question of fault or privity in relation to a limited company was exhaustively considered by the House of Lords in the case of *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*¹³ That was a case of loss by fire, and the decision related to section 502 of the Merchant Shipping Act, 1894. But the considerations affecting fault or privity would have been no different had the claim been for limitation of liability under section 503. The action arose out of a loss through the unseaworthiness of a ship belonging to a limited company, and the evidence indicated that the unseaworthiness was known, or ought to have been known, to the managing director of the company. The managing director was not called as a witness, and in the circumstances it was held that the company had not

¹³ [1915] A.C. 705.

discharged the burden of proving that the loss occurred without their actual fault or privity. I think it will be helpful to quote in extenso a passage from the speech of Viscount Haldane L.C., who laid down in the clearest possible terms the principles applicable in such a case. He said ¹⁴: "My Lords, a corporation "is an abstraction. It has no mind of its own any more than it "has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some "purposes may be called an agent, but who is really the directing "mind and will of the corporation, the very ego and centre of the "personality of the corporation. That person may be under the "direction of the shareholders in general meeting; that person "may be the board of directors itself, or it may be, and in some "companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the "articles of association, and is appointed by the general meeting "of the company, and can only be removed by the general "meeting of the company." The Lord Chancellor then dealt with the position of the managing director of the particular company, Mr. Lennard, on the facts of the particular case, and proceeded ¹⁵: "For if Mr. Lennard was the directing mind of the "company, then his action must, unless a corporation is not to "be liable at all, have been an action which was the action of "the company itself within the meaning of section 502. It has "not been contended at the Bar, and it could not have been "successfully contended, that section 502 is so worded as to "exempt a corporation altogether which happens to be the owner "of a ship, merely because it happens to be a corporation. It "must be upon the true construction of that section in such a "case as the present one, that the fault or privity is the fault or "privity of somebody who is not merely a servant or agent for "whom the company is liable upon the footing respondeat "superior, but somebody for whom the company is liable because "his action is the very action of the company itself. It is not "enough that the fault should be the fault of a servant in order "to exonerate the owner; the fault must also be one which is not "the fault of the owner, or a fault to which the owner is privy."

It appears to me that the present case is to be determined by applying as nearly as possible the principles there enunciated to the facts that have been proved in evidence. Vice-Admiral Sir Michael Denny gave evidence to the effect that at the time of the construction of the *Truculent* the builders' plans prepared by the

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¹⁴ [1915] A.C. 713.¹⁵ Ibid.

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Director of Naval Construction would have been submitted by the then Third Sea Lord to the full Board of Admiralty and approved by them. The detailed plans, showing in detail the actual position of the ship's lights, would not ordinarily go before the full Board, but (as I understand it) these would be submitted to the Third Sea Lord for approval—or at least he would have access to them and would be responsible for them. The *Truculent* was of course constructed before the present Third Sea Lord assumed office as such, and Vice Admiral Sir Michael Denny does not claim to have himself studied in detail the plans of a submarine of the class of the *Truculent*. But he has told me that he is familiar with ships of that class, and was aware that, as in the case of other classes of submarines, the lights carried by them did not fully comply with the collision regulations. In particular he was aware that the steaming light of a submarine of the class of the *Truculent* was not in accordance with art. 2 (a), and indeed it was clear from his evidence that he has given active consideration to the practicability of overcoming that defect. I have no doubt that what is within his knowledge must have been, and must certainly be deemed to have been, within that of his predecessors in office. The position, therefore, is that the *Truculent*, in common with other submarines, was allowed to navigate on the surface by night equipped with a steaming light which, to the knowledge of the responsible member of the Board of Admiralty, if not to the actual knowledge of the Board as a whole, did not comply with art. 2 (a), and was liable to be misleading to other vessels.

If, therefore, there was a fault in relation to the lights exhibited by the *Truculent*, as I have found that there was, that fault was one of which the responsible member of the Board of Admiralty was aware, or must be deemed to have been aware, that is, one to which he was privy. If it was necessary to publish a notice to mariners dealing with the lights carried by submarines, it was within the province of the Third Sea Lord, as I understand it, to publish such a notice on the authority of the Board as a whole. In relation to such a matter as the proper equipment of His Majesty's vessels the Third Sea Lord was, and is, in my judgment, the "directing mind" of the Admiralty, to use Viscount Haldane's phrase. It follows that his fault or privy is the fault or privy of somebody who is not merely a servant or agent for whom the Admiralty is liable upon the footing respondeat superior, but somebody for whom the Admiralty is liable because his action is the very action of the Admiralty itself.

For these reasons I am not satisfied that the loss and damage in question in this case occurred without the actual fault or privity of the Admiralty, and in my judgment, therefore, the claim on behalf of His Majesty for limitation of liability fails and must be dismissed.

Claim dismissed.

Solicitors: *Treasury Solicitor; Hill, Dickinson & Co.; Pattinson & Brewer; Rowley, Ashworth & Co.; Haslewood, Hare & Co., for Bassett & Boucher, Gillingham, and for Sutton, Cheshire & Thompson, Newcastle-upon-Tyne; W. H. Thompson & Co.; Faithfull, Owen & Fraser, for Winch, Greensted & Winch, Rainham, Kent; Greenwood & Son.*

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Shipping—Collision—River Thames—Both vessels in breach of the bye-laws—Failure to exhibit second masthead light in addition to towage lights—Porting over to wrong side of channel—Breach of crossing rule—Duty of vessel navigating against tidal stream when approaching or rounding point or sharp bend—Port of London River Bye-Laws, 1938, bye-laws 8 (b), 14 (a) (b), 38, 39 and 42 (a).

The steamship *Wirral Bank* having loaded her cargo and cast off from a jetty on the north side of the Gallions Reach of the River Thames bound for a Belgian port, was heading down-river and was allowed to drop stern first up-river on the tidal flood stream in order to clear the end of a pier. She then went slow ahead on her engines, and under starboard wheel across the river for the purpose of crossing to the south side.

At about the same time the steam hopper *King's Channel*, a vessel of 175 feet in length, with another hopper in tow, made fast alongside her port side, was approaching up-river on a flood tide, keeping to the starboard side of the fairway. She was exhibiting side lights, two white towing lights on her foremast, and a fixed stern light. On approaching Tripcock Point, her wheel was put to port at an improper time and to a greater degree than was necessary to take her round the point, which caused her to leave her proper side of the channel and to get into her wrong water. Each vessel had sighted the other in sufficient time to appreciate that there was a risk of collision between them, but both persisted in their manœuvres till they came into collision on the south side of the channel just above the point. On a claim for damages by the

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King's Channel against the *Wirral Bank*; and on a counterclaim by the *Wirral Bank*:—

Held, (1) that there was no provision in bye-law 14 of the Port of London River Bye-laws (i) to relieve any vessel over 150 feet in length, having another in tow, from the duty of exhibiting a second white steaming light as required by bye-law 8 (b), and the *King's Channel* was in breach of her duty to comply with that bye-law, though this breach did not contribute to the collision; (2) that the *King's Channel* also failed to comply with bye-law 38 (ii) by porting over on to the wrong side of the channel; (3) that the *Wirral Bank* crossed the river from the north side to the south side at an improper time having regard to the presence of the *King's Channel*, and was in breach of bye-law 39 (iii); that she failed also to comply with bye-law 42 (a) (iv) in that, while navigating against the tidal stream, she failed to ease her speed or stop in order to avoid risk of collision on approaching a point; and that the bye-laws were applicable against the *Wirral Bank* at one and the same time; (4) that both vessels were guilty of a bad look-out in that in each case the master was on the bridge alone, navigating the vessel single-handed; (5) that both vessels were, therefore, to blame for the collision in equal degree.

ACTION.

The plaintiffs, the owners of the steam hopper *King's Channel*, claimed against the owners of the steamship *Wirral Bank* for damage sustained by the *King's Channel* when the two vessels collided, during the hours of darkness on March 1, 1951, at the lower end of Gallions Reach of the River Thames. The *King's Channel*, a large steam hopper of 583 tons gross, with a length of 175 feet, was, at the material time, proceeding up-river on a flood tide of a force of about $1\frac{1}{2}$ to 2 knots bound for the Royal Albert Dock, and was towing another hopper which was made fast alongside her port side. Both vessels were in light condition. The *King's Channel* carried the two white lights prescribed by bye-law 14 (a) of the Port of London River Bye-laws, 1938, for a steam vessel with another in tow, as well as side lights and a fixed stern light. Her tow (the *Irk*) was also exhibiting side lights and a fixed stern light. The *Wirral Bank*, a vessel of 375 tons gross and with a length of 135 feet, had loaded a cargo of coke breeze at the Beckton No. 2 jetty on the north side of Gallions Reach, and shortly before the collision had cast off for the purpose of proceeding to sea in the course of a voyage to Belgium. Neither the weather nor the wind was of any materiality. Until the *Wirral Bank* cast off from the jetty she had been lying head down-river and, having cast off, she had been allowed to drift up with the tide angling towards the south shore, with the result

that she was showing her red light to any vessel approaching up Barking Reach.

The case for the *King's Channel* was that the *Wirral Bank* was taken to be a vessel stationary on the north side of the river. There was nothing else under way in the vicinity, and the *King's Channel* thought she had a clear river. In those circumstances, being bound for the Royal Albert Dock, she took port wheel action. It was, of course, necessary to take port wheel action in order to round the bend at Tripcock Point; but she ported earlier and to a greater extent than would be necessary merely for that purpose, because it was her intention to round the bend on the south side and to proceed up Gallions Reach on the south side, so as to enable her to get a good clear space for swinging round in order to enter the Royal Albert Dock. She was already beginning that manœuvre when the red light of the *Wirral Bank* was seen. The evidence was that no signal was heard from the *Wirral Bank*, but that at the last moment the *Wirral Bank* came ahead across the river, sounding for the first time a signal of one short blast. By that time it was said that it was too late for the *King's Channel* to change her manœuvre. The collision happened well over on the south side of the river. The *King's Channel* blamed the *Wirral Bank* for coming across the river in that way and at that time, instead of waiting a little longer in her position of safety on the north side until the *King's Channel* had passed. It was contended that in adopting her manœuvre the *Wirral Bank* was at fault for breach of the crossing rule, namely, bye-law 39 of the Port of London River Bye-laws, 1938,¹ and it was also said

¹ (i) The Port of London River Bye-laws, 1938, bye-law 8: A steam vessel other than a steam launch shall exhibit by night—

"(a) On or in front of the foremast or if a vessel without a foremast then in the fore part of the vessel a bright white light so constructed as to show an unbroken light over an arc of the horizon of 20 points of the compass so fixed as to throw the light 10 points on each side of the vessel, viz., from right ahead to 2 points abaft the beam and of such a character as to be visible at a distance of at least 2 miles; (b) Either forward or aft of the white light mentioned in sub-clause (a) a second white light similar in construction and character to that light. Vessels of less than 150

"feet in length shall not be required to carry this second white light but may do so."

Bye-law 14 (a): "A steam vessel, when towing another vessel or when attached to another vessel for the purpose of towing or manœuvring the same, shall be fitted with a mast of not less than 15 feet in height above the hull unless such towing vessel has a funnel of such a height as to be visible above the vessel being towed or attached to the towing vessel . . . and shall by night in addition to her side lights exhibit 2 white lights in a vertical line one above the other not less than 4 feet apart."

(ii) Bye-law 38: "Every vessel proceeding up or down the river shall, when it is safe and practicable, keep

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that she was in breach of bye-law 42 (a) (iv), namely, the bye-law which applied to vessels navigating against the tidal stream when approaching or rounding a point or a sharp bend. The case for the *Wirral Bank* was that when the *King's Channel* was first seen, swinging to port and showing towing lights, she was thought to be rounding head to tide below the point for the purpose of proceeding alongside the buoys on the south side of the river just below the point; that as there seemed to be nothing in the way to impede her manœuvre the *Wirral Bank* proceeded with her operation of crossing the river to her own proper side of the channel. It was contended that the *King's Channel* was to blame for breach of bye-law 38.

The owners of the *Wirral Bank* counterclaimed against the *King's Channel* for the damage suffered by the *Wirral Bank*.

The arguments of counsel material to this report appear in the judgment.

K. S. Carpmael K.C. and *P. Bucknill* for the owners of the *King's Channel*.

J. V. Naisby K.C. and *J. B. Hewson* for the owners of the *Wirral Bank*.

WILLMER J., after stating the facts:—The main point against the *King's Channel* is the fact that the collision happened in her wrong water, and that she got into her wrong water by a continuous course of porting over to the wrong side, in the face of obvious danger from the approaching *Wirral Bank*.

But first of all I would like to consider a subsidiary charge levelled against the *King's Channel*. It is said that the *King's Channel*, being a vessel of more than 150 feet in length, was in breach of her duty under bye-law 8 (b) of the Port of London River Bye-laws, 1938, in that she did not exhibit a second white light abaft the forward light. She was in fact exhibiting two lights vertically above each other, such as are prescribed for a steam

"to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

(iii) Bye-law 39: "Every steam vessel crossing from one side of the river to the other side shall do so at a proper time having regard to vessels navigating up and down the river, and shall be navigated so as not to cause obstruction, injury

"or damage to any other vessel."

(iv) Bye-law 42 (a): "Every steam vessel navigating against the tidal stream shall if necessary in order to avoid risk of collision ease her speed or stop on approaching, or when rounding a point or sharp bend so as to allow any vessel navigating with the tidal stream to pass clear of her."

vessel with another vessel in tow. It is said by the defendants that the obligation to carry the towing lights prescribed by bye-law 14 in no way reduces the obligation, in the case of a vessel of 150 feet and over in length, to carry a second masthead light abaft the first masthead light. On the other side it is contended that bye-law 14 comprises a self-contained code governing all the obligations of a steam vessel having another in tow. Bye-law 14 (a) prescribes, and prescribes only, that a steam vessel when towing another vessel shall by night "exhibit two white lights in a vertical line one above the other," and it is said that that, inferentially at any rate, excludes any obligation to comply with bye-law 8 (b).

So far as I know there is no authority on this question. My own view is that there is nothing in bye-law 14 which in any way excludes the duty of a steam vessel of 150 feet and over in length to exhibit a second masthead light, notwithstanding that she happens to have something else in tow. If it had been the intention to prescribe that a steam vessel having another in tow should in no circumstances exhibit the second white light prescribed by bye-law 8 (b), it would have been the easiest possible thing to say so expressly in bye-law 14. No such express provision is made, and I should be disposed to hold, therefore, that the obligation to conform with bye-law 8 (b) continued, notwithstanding the fact that the vessel in question had another in tow.

In my judgment, however, any such breach of the bye-law on the part of the *King's Channel* is of no materiality in the present case, because it certainly is not proved to my satisfaction that it contributed in any way to the collision which occurred. Certainly the master of the *Wirral Bank*, who was the only witness from the deck of the *Wirral Bank* called before me, did not claim that he was in any way misled by the lights of the *King's Channel*. On the contrary, his case was that, throughout, he saw perfectly well what the *King's Channel* was doing, namely, that she was swinging to port from beginning to end. In those circumstances it seems to me that, had a second white light been exhibited in accordance with bye-law 8 (b), it would not have conferred on the master of the *Wirral Bank* any knowledge which he did not already have.

This is a matter which I have discussed with the Elder Brethren, whose views I have asked because it seems to me that it is a matter peculiarly within their competence as seamen to advise me, and they are wholly in agreement with the view which I have stated, namely, that in the circumstances of this case it

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cannot be said that the absence of the second light contributed in any way to the collision.

That leaves the *King's Channel* under attack on what I have described as the main point against her, namely, her action of porting and continuing to port right over on to her wrong side of the river, and maintaining her speed throughout, right up to the moment of collision. It is claimed on her behalf that, vis-à-vis the *Wirral Bank*, she was perfectly entitled to do so. It is said that the *Wirral Bank* was a vessel crossing the river, quite apart from the suggestion that she was also navigating against the tidal stream; and that, vis-à-vis a vessel in such a position, an up-coming vessel like the *King's Channel* is free to navigate in whatever part of the channel she chooses. It is contended that whether the up-coming vessel is on her proper side or the wrong side, the blame for the collision must be wholly put on the crossing vessel, because it is said that the crossing vessel owes a duty to any up-coming vessel not to cross so as to embarrass her, quite regardless of whether the up-coming vessel is on the proper or the wrong side of the river.

I certainly cannot accede to that argument. It seems to me that a vessel navigating up or down the river owes a duty under bye-law 38 of the Port of London River Bye-laws, 1938, to keep on her own starboard side of the channel when safe and practicable, and she owes that duty, in my judgment, to every other vessel using the river. The *Wirral Bank* was just as much entitled to expect the *King's Channel* to obey bye-law 38 as any other vessel would have been entitled to expect her to do so. So far as the bye-law is concerned, I can find no excuse whatever for the breach of the bye-law by the *King's Channel*. By that breach she got right over on to the wrong side of the river into a position where she had no business to be.

Without assistance, and considering the matter simply on the construction of the bye-law, I should have come to the conclusion that her conduct in so doing was utterly indefensible. But I am fortified in that conclusion by having discussed the seamanship aspect of this with the Elder Brethren. I have received great assistance from hearing their views as to how a seaman would interpret his obligation under these bye-laws. They leave me in no doubt that their view as practical seamen is that nothing is more unseamanlike, and nothing is more calculated to cause collisions, which may have disastrous results, than such deliberate action as that of the *King's Channel* in coming over to the wrong side of the river. They tell me that it is a familiar fault; that

vessels using the Thames persist in cutting the corners and getting on to the wrong side of the channel when it suits their convenience to do so. Speaking as seamen, they tell me that they regard that as one of the worst and most dangerous faults that one can commit in a narrow river like the Thames. Therefore, I feel that in expressing my own views rather strongly against the *King's Channel* from the point of view of observance of the bye-laws, I am very much fortified by the views of the seamen who advise me from the point of view of the practical aspect of navigation.

In my judgment, fortified as I am by the views of the Elder Brethren, the conduct of the *King's Channel* in getting right over on to the wrong side of the channel was utterly indefensible and inexcusable, and she must certainly be held to blame in respect of this fault. But that does not conclude the case. It may be that the *King's Channel* did the wrong thing, and flagrantly disregarded the requirement of the bye-law which governed her navigation. But she did so under the eyes of those in charge of the *Wirral Bank*, who watched her doing so, as I have found, for a period of something like four minutes, or at any rate, a period measured in minutes. She did so during a period in which the *Wirral Bank*, starting from right over on the north side, got right over on to the south side, where the collision happened, and it is said against the *Wirral Bank* that that was a violation both of the crossing rule and of bye-law 42 (a).

I myself know of no case in which a vessel has previously been held to blame at one and the same time for breach of both these bye-laws; but I see no reason why in principle they should not both be applicable. Certainly the plain, common sense of the situation in this case is that the *Wirral Bank* was a vessel crossing from one side of the river to the other side. It is true that she was not going at right angles across the river; but she remained a vessel crossing from one side to the other side. Equally, she was a vessel navigating against the tidal stream. It may well be that she was not completely fore and aft with the tidal stream, but that she was angled to it; but substantially, from a practical point of view, she was navigating against it. She certainly was not navigating with the tide under her. Accordingly, I see no reason why both these bye-laws cannot properly be invoked against the *Wirral Bank*.

The effect of each of them in the circumstances of this case is substantially the same. The crossing rule prescribes that a vessel must cross at a proper time having regard to vessels navigating

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up or down. Interpreting that in the light of the facts of this case, she must do it at a proper time having regard to the *King's Channel*, which was, vis-à-vis the *Wirral Bank*, a vessel navigating up the river. Similarly, under bye-law 42 (a), she is required, if necessary in order to avoid risk of collision, to ease her speed or stop on approaching or rounding a point. In this case I am only concerned with her during the time that she was approaching the point. She was undoubtedly approaching the point and was faced with a situation in which a vessel coming up with the tide was approaching in such a manner as to cause risk of collision.

It seems to me to be no answer to say that the vessel coming up with the tide was herself disobeying some other bye-law; she was in fact approaching with risk of collision during a period of time measurable in minutes. It seems to me impossible to contend that because the *King's Channel* was in fault for getting over to her wrong side of the channel that in any sense relieved the *Wirral Bank* from her obligation to cross the river at a proper time, or from her obligation, if necessary to avoid risk of collision, to take off her way. So much for the effect of the bye-laws. But before applying them against the *Wirral Bank* I desired to satisfy myself whether in the circumstances of the case the *Wirral Bank* had any practicable alternative. It might be said that when she started on her crossing of the river (something like four minutes before the collision) it was perfectly safe, having regard to where the *King's Channel* then was and what the *King's Channel* was then doing, but that once having started to cross she was committed to it and could not safely desist from the operation. In those circumstances I thought it proper to consult the Elder Brethren as to whether it was practically possible for the *Wirral Bank*, once she was launched on that manœuvre, to discontinue it so as to avoid risk of collision. She was, it must be remembered, angled partially athwart the tide, and I was concerned as to whether it would have been safe and practicable for a vessel in that situation to do anything other than go on. However, the Elder Brethren assure me that, at any rate with a vessel of this size navigating in these conditions, there would have been no difficulty at all in the *Wirral Bank* discontinuing her manœuvre of crossing the river. They tell me that it would be quite easy, and would have been a perfectly proper seaman-like thing for her to do, to use such helm action as would get her on to a down-river heading so as to face the tide, and that, having done so, she would equally have had no difficulty in

taking off her way and holding herself head down-river stemming the tide. I am advised that that is a thing which she could quite easily have done at any stage of her journey across the river. If she had done so, it seems clear that certainly this collision could not possibly have happened. It seems to me to be equally clear as a matter of common sense—I am advised by the Elder Brethren that it is also clear as a matter of seamanship—that a vessel in that position affords the best possible opportunity for the up-coming vessel to get by in safety. If she holds herself stemming the tide head down-river, the up-coming vessel has a chance of passing her in clear water either on one side or the other, whichever is safe in the circumstances. If it was possible, as I am advised it was, for the *Wirral Bank*, at any moment during her operation of crossing the river, to bring about that position of safety, it was, in my judgment, her duty to do so, and to desist from the operation of crossing the river.

In those circumstances, I have no doubt on the facts of this case that the *Wirral Bank* was in fault for continuing on with her operation, which seems to me to amount to conduct in direct violation of both the bye-laws that have been referred to. It would not make any difference to my view if it were held that only one of the two bye-laws could be invoked against the *Wirral Bank* at one and the same time. In either case, having regard to the advice I have received as to what would have been possible, I should have come to the same conclusion, namely, that the *Wirral Bank* was quite unjustified in continuing on. I would like, by way of conclusion of this part of my judgment, to stress those words “continuing on.” It seems to me that the vice in this case (and I speak both with reference to the *Wirral Bank* and with reference to the *King's Channel*) was that both these vessels continued on for a substantial period of time with their negligent manœuvres in the face of obvious danger. So far as I can see, it lay within the power of either of them up to a very late moment to put an end to that position of danger by each conforming with their duties under the bye-laws; but, as I have said, they continued on in the face of obvious danger, and it seems to me that neither of them can possibly hope to escape blame.

On a general view of the facts of the case, the impression left on my mind, and it is an impression which is shared by the Elder Brethren, is that this collision was essentially caused by bad look-out on the part of both vessels. It is not only that they both, in my judgment, broke the bye-laws which were applicable,

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but they both appear to have been guilty of a serious failure to appreciate the position of danger which was developing over a period of minutes before their very eyes. As moment succeeded moment the vessels drew nearer to each other and the danger mounted. Those in charge of each of these two vessels seem to have been quite oblivious of that mounting danger until the very last moment, and that is what I mean when I say that this collision is really a collision caused by bad look-out on the part of both vessels.

In that connexion I desire to refer to an aspect of the case which has been little stressed in argument, but which has disturbed me to a considerable extent and has disturbed the Elder Brethren. I refer to the fact that each of these two vessels was being navigated single-handed by her master, who was alone on the bridge and doing everything himself. Each of these masters was himself at the wheel, and neither of them had the assistance of any other person on the bridge. It is not a case where there was any shortage of manpower. So far as the *King's Channel* is concerned, it was pleaded that she had a crew of fifteen hands. In evidence that came down to ten hands; but I think even that was an error, because when the master came to count heads he really showed, I think, that there were eleven persons on board, and one of those persons was the second mate. The first mate was definitely not on board. There were also four deck hands.

So far as the *Wirral Bank* was concerned, I do not think there was any question as to conflict about the number of her crew. She was manned by a crew of eleven hands. It seems to me, as a landsman, a strange fact that when you have that manpower available so much should be left in the hands of one man. I was gratified to find that my view of the matter was abundantly confirmed by the view of the Elder Brethren.

I think that it is not inappropriate to refer to a case which was not cited in argument, but where a question of this nature was considered by the court. I refer to *The Saint Angus*.² That was the case of a master who was navigating a small vessel single-handed; a collision occurred because at the critical moment he was taken ill or fainted, with the result that for an appreciable period of time the ship was left with nobody in charge of her. The owners of the vessel, when sued, attempted to set up the defence of inevitable accident; but that defence failed, Hodson J. coming to the conclusion that it was not satisfactorily proved that everything that could be done was done to avoid the collision. I think that it is valuable to refer to what was said

² [1938] P. 225.

in his judgment by Hodson J., who was, on that occasion, advised by one Elder Brother. He made it clear that he was not prepared to lay down any general proposition to the effect that at all times it is necessary to maintain more than one person on the bridge; and equally I wish to make it clear that what I am saying in this case in no way amounts to laying down a general rule. Clearly every case must depend on its own facts. One must have regard to the particular circumstances of the particular vessel in the particular locality on the particular occasion. Hodson J., in that case, was considering a vessel which had a crew of seven; I am considering here vessels which, if my arithmetic is correct, each had a crew of eleven. They were, therefore, to that extent, better off than was the case in *The Saint Angus*.² What I do say is this (and I say it with the full concurrence of the Elder Brethren): that in the particular circumstances of this case, having regard to the crews that were available on board each of these vessels, having regard to the place where the collision took place and the time when it took place, namely on the flood tide at the bottom of Gallions Reach, close to the entrances to the Albert Dock system, close to the various jetties and buoys where craft might be expected to be lying or manœuvring—bearing in mind all those considerations and the particular circumstances, it was wrong on the part of both these vessels to leave everything in the hands of one man on the bridge. It is putting too much on the master to expect him to navigate vessels of this size in these conditions single-handed. That is a circumstance which, I have no doubt, contributed, and contributed in no small measure, to the fault which I have described as being the real fault underlying this collision, namely, bad look-out and failure to appreciate a situation of danger that was unfolding before the very eyes of those in charge of the two ships. Both vessels are seriously to blame for this collision.

In this case I have searched in vain for any circumstance which would enable me to say that there was a clear preponderance of blame on the one rather than the other. Both vessels, it seems to me, were navigated almost as badly as it was possible to navigate vessels in a situation such as this, and I can find no ground at all for distinguishing between them.

Accordingly, I pronounce both vessels to blame in equal degree.

Solicitors: *William Hurd & Son; Holman, Fenwick & Willan.*

² [1938] P. 225.

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Dec. 10, 11, 12, 20. *Husband and wife—Desertion—Constructive desertion—Expulsive conduct—Words intended to be final and conclusive—Condonation—Revival of constructive desertion.*

Somervell,
Jenkins and
Hodson L.JJ.

A wife who had resumed cohabitation with her husband after obtaining against him a separation order on the ground of constructive desertion, again left the matrimonial home after a stay of about nine days and was granted by justices a fresh separation and maintenance order, also on the ground of constructive desertion. Those justices had not sat on the bench when the first order was made nor were the notes of evidence taken on the first occasion put in evidence before them. On appeal by the husband to the Divisional Court the above-mentioned notes of evidence were before that court, which dismissed the appeal.

The husband further appealed, it being contended (*inter alia*) on his behalf that the Divisional Court was not entitled to look at the notes of a previous hearing which were not in evidence before the justices from whom the appeal was brought.

Held, (*per totam curiam*) that no formal objection having been taken in the Divisional Court to the notes of evidence being looked at, the point could not be taken in the Court of Appeal.

The court dismissed the appeal, Somervell and Hodson L.JJ. considering that the evidence taken as a whole justified the decision of the Divisional Court, upholding the decision of the justices; Jenkins L.J. dissenting, held that the findings of fact embodied in the reasons assigned by the justices for their decision did not satisfy the test of constructive desertion, enunciated in *Buchler v. Buchler* [1947] P. 25.

Per Somervell L.J.: When there has been a resumption of cohabitation [after a wife has been granted a separation order on the ground of constructive desertion] the reasons which led her to leave the matrimonial home may be of vital importance. If she has been driven out on the first occasion by repetition, over a period of time, of a course of conduct, whether physical or verbal, a resumption of cohabitation, if the offending spouse is sincere, must be on the basis that he will abstain from renewing that course of conduct. With that history any real indication, though over a very short period of time, that the offending spouse is going to behave as before might amount to constructive desertion, although insufficient to do so without that past history. It is not that less is required to justify such a finding, in the sense laid down in *Beard v. Beard* [1946] P. 8, but that the significance of the present acts is affected by what has gone before.

Decision of the Divisional Court [1951] P. 284 affirmed.

APPEAL from Divisional Court.¹

The parties were married in 1946. In April, 1950, the wife left the matrimonial home in Doncaster and took out a summons

¹ [1951] P. 284.

which was heard by the justices at Bradford on April 28, 1950, when an order was made against the husband on the ground of constructive desertion, and maintenance was fixed at £2 a week. The husband did not appeal against that order, but on September 4, 1950, he applied for a variation of the maintenance order, which was reduced to 35s. a week. Shortly afterwards, on the initiative of the wife, the parties met and agreed to come together again. They resumed cohabitation on October 8, 1950, but on the 17th of that month they finally parted, the wife again leaving the matrimonial home and taking out a further summons before the justices for desertion.

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At the hearing of the earlier summons the wife had complained that after the first 12 months of the marriage the husband had been lacking in affection and attention, had sometimes not spoken to her for a whole day, and had frequently on other occasions told her to leave. After the resumed cohabitation, she alleged, he had often taunted her with the phrase "I never asked you to come back," and had kept her short of housekeeping money.

On November 6, 1950, the justices made another order against the husband on the ground of constructive desertion and increased the wife's maintenance to £2. They were of opinion that the husband by his conduct had caused the wife to leave him, and she was justified in so doing; that after resuming cohabitation the husband was inconsiderate in his attitude to his wife, which showed her that she was not welcome back; that he had frequently taunted her with the phrase "I never asked you to come back"; and that his demeanour in the witness-box was such as to lead them to consider that his promises could not be relied on.

None of the justices sitting on November 6 had been members of the court before which the first summons was heard; the notes of evidence taken on that first occasion were not before them; and there had been no cross-examination on behalf of the husband as to that evidence.

The husband appealed to the Divisional Court, and on April 18, 1951, Lord Merriman P. and Willmer J. dismissed his appeal, holding that the words used by the husband were in the circumstances capable of meaning that the husband wished to be rid of the wife as soon as possible, and that the justices had had before them evidence on which they could find that he meant to drive her from the home.

At that hearing it was agreed that it would be right for the Divisional Court to see the notes of the evidence given on the first summons before the justices, and there was an adjournment

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 1951 counsel for the husband did not object to the notes being looked
 at by the court, but raised some objection to their being treated
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The husband further appealed.

Simon K.C. and *Basil Garland* for the husband.

Tyndale K.C. and *John Hazel* for the wife.

Cur. adv. vult.

December 20. The following judgments were read:—

SOMERVELL L.J. This is a husband's appeal from a decision of the Divisional Court affirming a decision of the justices for the city of Bradford, given on November 6, 1950, whereby he was ordered to pay £2 a week by way of maintenance. Four points were argued before us: (1) Were the Divisional Court entitled to look at notes of a previous hearing before the justices which were not in evidence before the justices on November 6, 1950? (2) Was the husband's conduct desertion in law? (3) Does the doctrine of condonation and revival apply to desertion, so that on resumption of cohabitation after a period of desertion less is required to re-establish a state of desertion on the principle of *Beard v. Beard*.² (4) That on quantum the figure of £2 could not stand. With regard to point (3), Mr. Simon for the appellant argued that the doctrine had no application. [His Lordship stated the facts and continued:] Before the justices on November 6 there was no cross-examination, as there might have been, on what took place when the first order was made. Two of the justices sitting on November 6 had sat on September 4, but none had been sitting when the first order was made. Before the Divisional Court the importance of the earlier order, as part of the history, arose. Mr. Simon, on behalf of the husband, submitted that, having regard to the circumstances in which orders of this kind are sometimes made, the matter was of little or no assistance. It was, however, agreed that it would be right for the court to see the notes of the evidence on the previous occasion, and there was an adjournment so that the notes could be obtained. At the resumed hearing Mr. Simon, while, as he told us, not objecting to the notes being looked at, raised some objection to their being

² [1946] P. 8.

treated as material available to the court in considering whether the order made by the justices should be set aside. This would be a submission which would require very precise formulation, and as Willmer J. makes no reference to it I cannot think it can have been very clearly put. In any case I do not think it can be taken in this court. Before the adjournment an objection might well have been taken on the ground that the notes of the first hearing were not before the justices. It is impossible to say what course the court might then have taken. Having regard to what happened below I think that the Divisional Court were entitled to consider these notes as part of the material before them, and that Mr. Simon's first point fails.

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I agree with the President and Willmer J. that in a case like this, when there is a resumption of cohabitation, the reasons which led to a previous desertion may be of vital importance. If, for example, a wife has been driven out on the first occasion by repetition, over a period of time, of a course of conduct, whether physical or verbal, a resumption of cohabitation, if the offending spouse is sincere, must clearly be on the basis that he or she will abstain from renewing that course of conduct. With that history any real indication, though over a very short period of time, that the offending spouse is going to behave as before, might amount to constructive desertion, although insufficient to do so without the past history. It is not that less is required in the sense of *Beard v. Beard*,³ but that the significance of the present acts is affected by what has gone before.

I therefore propose to consider the matter, as did the President and Willmer J., on the basis that the notes of the first hearing are available material. They must, of course, like all such notes, be treated with caution. They are not transcripts, nor is it right to assume that any particular fact deposed to in favour of the successful party was necessarily accepted by the justices. It is clear that, after speaking of lack of affection and not speaking to her, the wife's main case was that he kept on telling her to go, to go to Bradford to her sister. She went. She then dealt with her attempts to come back, which were repulsed: and this the husband admitted. He admitted that things had become very difficult, but his main case was that she had been provocative, had slapped him and hit his eye, and that he was sorry to see her go in a sense, though he admitted that he later would not

³ [1946] P. 8.

C. A. have her back. It is, I think, a fair inference that the justices, in substance, accepted her account of the married life.

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[His Lordship then referred to the notes of evidence at the hearing on November 6, and continued:] The justices, on the application for wilful neglect to maintain, found that the sum for housekeeping expenses in the aggregate was not unreasonable but that the husband's attitude was inconsiderate. They also found, as they were entitled to do, that the husband's offer to have the wife back was not a genuine offer; in other words, that he did not want her back. Mr. Simon conceded before the Divisional Court, and before us, that it was impossible for him to challenge that finding. I agree with the President in thinking that is a very important matter in considering the whole case.

The leading decision of this court on this subject is *Buchler v. Buchler*.⁴ It was rightly read to us, as it was to the Divisional Court. I have in mind, but do not propose to repeat, the considerations which in the light of that case must be borne in mind. It was submitted that the Divisional Court concentrated too much on the intention of the words as used by the husband and did not have sufficient regard to whether that intention took effect and was the cause of the wife's leaving. Both, of course, are necessary ingredients. But if words of expulsion are used and the other spouse leaves, the natural conclusion is that the words have had their intended effect, unless there is some reason to take a different view. Mr. Simon relied on a sentence in the note of her cross-examination, but, as Hodson L.J. pointed out in the course of the argument, it may be very dangerous to isolate a sentence in a note in cross-examination. Something is put to which the witness assents. It is true but may not be the whole truth. The note must be looked at as a whole, bearing in mind that it is not a transcript. I think this criticism fails.

I have re-surveyed the facts out of deference to Mr. Simon's able argument, but for the reasons given by the Divisional Court I think they were right in not setting aside the justices' order. There is, I think, sufficient material to justify their decision. Should the matter later come before a judge in Divorce proceedings, the decision of the justices, affirmed as it has been, will be of high evidential value but not, in my opinion, conclusive.

This makes it unnecessary to consider the point raised by the wife with regard to condonation. I will only say that I myself

⁴ [1947] P. 25.

find it difficult to apply the doctrine of revival to a case like the present. The question here is whether the husband was in a state of desertion on October 18. The earlier history is relevant in deciding that issue, but the previous desertion from April to October is not and cannot be an ingredient in the new desertion. As part of the history it does not require revival. On quantum I have nothing to add to what is said by Hodson L.J. in the judgment he will deliver. For these reasons, I think the appeal should be dismissed.

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JENKINS L.J. To my regret, I find myself unable to agree with the view taken by my brethren and the Divisional Court in this case; and I will state as briefly as I can my reasons for differing from them.

The justices' findings of fact at the hearing of November 6, 1950, are, I apprehend, to be regarded as contained in the written statement of the reasons for their decision, dated November 24 and filed November 29, 1950. I do not think it can be said that the evidence before them on November 6, 1950, was insufficient to warrant their findings of fact as recorded in their reasons, as distinct from the conclusion of law that the husband had constructively deserted the wife; but I cannot regard those findings as sufficient in law to support that conclusion.

The justices' reasons are thus expressed: " We were of opinion " that the husband by his conduct to his wife caused her to leave " him and that she was justified in so doing. That after living " apart by virtue of a justices' order made on April 28, 1950, on " the ground of desertion by the husband, the wife approached " him with a view to resuming cohabitation. The parties agreed " to and did resume cohabitation, but after the first day trouble " arose over money required by the wife for housekeeping. The " husband gave his wife money which, in the aggregate, was not " unreasonable having regard to their circumstances, but his " attitude was then inconsiderate. In our view it showed lack " of affection and was likely to show the wife that she was not " welcome back. He, according to the wife, often taunted her " with the phrase, ' I never asked you to come back.' That the " husband's request to his wife to return to him was not sincere " and that we, the justices, having seen the parties, and noted, " in particular, the demeanour of the defendant in the witness- " box, considered his promises could not be relied upon. We " accordingly found that the husband had deserted his wife and, " after taking into careful consideration the means of both the

C. A. "parties, made an order that the husband should pay to his wife
1951 "the sum of £2 per week."

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Speaking for myself, I find it impossible to hold that the findings of fact embodied in those reasons comply with the test of constructive desertion enunciated in *Buchler v. Buchler*.⁵ I need only quote this one passage from the judgment of Lord Greene M.R.: "In the case of constructive desertion where there is no such significant act as a departure by the spouse who is alleged to be in desertion, the acts alleged to be equivalent to an expulsion of the complaining spouse must be of such gravity and so clearly established that they can fairly be so described. If they do not satisfy this test, not only is expulsion in fact not proved but it is not legitimate to infer an intention to desert. A man may wish that his wife will leave him: but such a wish, unless accompanied by conduct which the court can properly regard as equivalent to expulsion in fact, can have no effect whatever."

The finding in the present case that "the husband by his conduct to his wife caused her to leave him and that she was justified in so doing" is, as I understand it, no more than a finding that she could not be held to have deserted him, or, in other words, to have left him without just cause, and seems to me to fall far short of a finding of conduct on his part equivalent to her expulsion by him. This to my mind applies with even greater force to the finding that his "attitude" was "inconsiderate," and in the view of the justices "showed lack of affection and was likely to show the wife that she was not welcome back."

As to the finding that he "often taunted her with the phrase "I never asked you to come back,"" even if this can be fairly divorced from the disagreements about money, which I doubt, and even allowing for the implications of the word "taunted," nowhere in fact used in the wife's evidence according to the notes, this seems to me the very type of expression treated in *Buchler v. Buchler*⁶ as insufficient to found constructive desertion unless accompanied by expulsive conduct. In other words, I do not think it is really any stronger than "If you do not like the way I behave you can go" in a case where the behaviour referred to, unaccompanied by such words, could not be regarded as equivalent to expulsion. The two matters of conduct here complained of by the wife were disputes about money, with respect

⁵ [1947] P. 25, 30.

⁶ [1947] P. 25.

to which the justices found his conduct "not unreasonable," and lack of affection. Neither of these two matters of complaint can, in my view, be held to amount to conduct equivalent to an expulsion of the wife. The finding to the effect that the husband's request to the wife to return to him was insincere does not by any means necessarily carry the implication that he had compelled her by his conduct to go. Spouses may separate and be happier apart without any expulsion of one by the other.

I agree that the wife's case is strengthened by the notes of the evidence at the first hearing before the justices. But it cannot be assumed that the justices who dealt with the present application in fact had those notes before them. Even if they did, that circumstance cannot alter the inadequacy, as I take it to be, of their findings as they actually stand. Those earlier notes were by consent considered in the Divisional Court, and were held in this court to have thus become part of the evidence to be taken into consideration on the present appeal. But if I am right in my view that the justices' findings of fact were not sufficient in law to support the conclusion of constructive desertion, the question, so far as the case turns on these notes, must be not whether the evidence including these notes amounted, when looked at as a whole, to evidence on which the justices could as a matter of law reach the conclusion to which they came, but whether having regard to these notes, in addition to the evidence actually before them, the justices' decision was right. There is an important distinction between these two questions. The former, if affirmatively answered, may well constrain an appellate court to uphold the justices even though the appellate court might itself have been disposed to take a different view. (See, for instance, *Pew v. Pew*,⁷ an unreported decision of this court, of which we were supplied with a transcript). The latter question, on the other hand, involves consideration and determination of the case *de novo*, or alternatively remission of the case to the justices for a new trial.

I appreciate the importance of the circumstance, noted by the justices, that the present application followed on the order made on April 28, 1950, on the ground of the husband's constructive desertion, and I appreciate also the importance of the evidence given on that occasion for the purpose of assessing the weight to be assigned to the wife's present complaints. But accepting the position that the husband did constructively desert his wife on

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⁷ Unreported; January 30, 1951 (C. A.)

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the first occasion, and that less objectionable conduct on his part should accordingly be regarded as capable of having an expulsive effect on the wife on the second occasion, I still find it impossible to collect from the events of the eight days of resumed cohabitation conduct equivalent to expulsion of the wife by the husband within the principle stated in *Buchler v. Buchler*.⁸

I do not think the cases on condonation and revival have any real bearing on the present case. The question here is not whether the wife, having forgiven the past desertion, was placed once more in a position to complain of it by the husband's conduct after cohabitation was resumed, but whether that conduct made him constructively a deserter when she left him for the second time; and in my view that question should be answered in the negative. The case might conceivably have been put on behalf of the wife—I will not say with what prospects of success—as a case of desertion by the husband followed by an abortive attempt at reconciliation which, when it broke down, left the husband in his original state of desertion (see, for instance, *Mummery v. Mummery*⁹); but, however that may be, it was not so put, and cannot now be dealt with on that footing.

I need hardly say that I have felt great hesitation in reaching a conclusion differing from that of others far more experienced than I am in this branch of the law; but for the reasons above indicated I find myself unable to hold that the wife has discharged the onus which lies upon her of proving that on this second occasion she left the matrimonial home under that degree of compulsion which must be established in order to make out a case of constructive desertion against the husband.

For these reasons, if the matter rested with me, I would allow this appeal. I have only to add that on the footing that the appeal on the issue of desertion is dismissed, I agree with my brethren that this court should not make any alteration in the amount of the maintenance ordered.

HODSON L.J., having stated the facts and the four questions raised by the appeal, continued:—On its face the evidence given before the justices seems to indicate that the statements “I did not ask you to come back” were linked with the complaints about the insufficiency of the money, and the appellant argues that if this is so, the justices having found that the money payments were reasonable, the wife cannot be said to have

⁸ [1947] P. 25.⁹ [1942] P. 107.

been driven out. I have found this case a difficult one, and my difficulty is not resolved by the justices' reasons, which do not seem to deal effectively with this argument. The reasons have been duly read by my brother Jenkins L.J.

Lack of consideration and affection does not make conduct tantamount to driving out which otherwise does not satisfy the test. This is I think made plain by the judgment of this court in *Buchler v. Buchler*,¹⁰ which was strongly relied upon by the appellant both here and in the Divisional Court. One passage in that case has already been read. There are other passages to which our attention was drawn which are important. Lord Greene M.R. said¹¹: "But the necessary conduct must, from the very nature of the offence of desertion, obviously be of a grave and convincing character. Whether in any given case this requirement is fulfilled is, I think, a question of fact upon which a jury would require to be carefully directed. It would be for the judge to say whether the facts were capable of being regarded as equivalent to an expulsion from the matrimonial home." Then¹²: "Moreover, if the conduct in question is in its nature insufficient, a statement that if she did not like it she could go, even if taken at its face value, could not, in my opinion, give to that conduct the character of desertion in fact. As I indicated earlier in this judgment, constructive desertion requires both factum and animus and an indication by the husband to the wife that she may leave him if she likes (animus) is not enough, unless the conduct is such as to amount to an expulsion (factum). This is not, in my opinion, affected by the doctrine that a person must be taken to intend the probable consequences of his acts: for if the acts are not such as to justify the wife in treating herself as expelled from the matrimonial home no inference can be drawn from those acts of an intention to expel her. Mere wish to expel, even if it exists, without acts equivalent to expulsion is, in my opinion, insufficient to constitute constructive desertion."

On the other hand there is the principle emphasized by another decision of this court, *Pew v. Pew*,¹³ to the effect that if in law the evidence is capable of amounting to evidence of desertion, this court is very reluctant to interfere with findings of fact by justices to whom this jurisdiction has been given by Parliament. I have come to the conclusion that the evidence,

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¹⁰ [1947] P. 25.¹¹ *Ibid.* 30.¹² *Ibid.* 45.¹³ Unreported.

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taken as a whole, is capable of being evidence of desertion on October 17. First, there is the background of the period during which the husband was admittedly in desertion. Secondly, as the President pointed out, the words " I never asked you to come " back " used often and in a taunting manner are not necessarily to be taken as solely bound up with the complaints about money, but may be taken to be an illustration of the husband's general attitude towards his wife. If this language was used often during the period preceding the wife's leaving it was conduct which could be regarded as expulsive and leading to the result stated, namely, his desertion. In the third place, the letter of October 20 is, I think, more consistent with desertion on his part than with what I have described as a neutral attitude. Having arrived at this conclusion of law, I agree with the opinion of the Divisional Court that the decision of the justices must stand.

I have dealt with the case on the footing of the facts as they were at the trial before the justices, omitting reference to the notes taken at the hearing in April when the husband was first found guilty of desertion. This brings me to the second point, namely, the contention that the Divisional Court should not have looked at that evidence, or, if they did, should not have based its decision upon it. Mr. Simon was in a difficulty about this matter since he admitted frankly that he had brought the situation upon his own head when he suggested the possibility that the previous order might well have been lightly made. He then, I think, was in this position: that he could not, and as I understand did not, resist the court looking at the evidence, at least for the purpose of countering that suggestion, by showing that the justices who adjudicated on the earlier occasion had material before them to justify their decision after hearing both sides to the dispute.

The justices who heard the case were not the same as those adjudicating in April, so that it cannot be said that they must necessarily, or probably, have had the previous evidence in mind to a greater or less extent. The evidence first given was not used in cross-examination in the later case. Accordingly, I do not regard the earlier finding of desertion as involving against the appellant in this case a finding that every matter in dispute then canvassed must be resolved in favour of the wife, the respondent to the appeal. On the other hand, the notes having been let in for one purpose could not, I think, be ignored as to their contents, and on examination they were found by the

Divisional Court to support the wife's case. With this view I agree.

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The question of revival of previous desertion by evidence of something less than that necessary to prove desertion in the first instance does not directly arise. Indeed, it could not do so in this case since, as Mr. Simon pointed out, the desertion charged here is on October 17, and the operation, if any, of the doctrine of revival on condonation would be to revive the earlier desertion in April, 1950, and not to establish a fresh desertion in October. For myself, I think also that although desertion as a complete offence under the law as it existed before 1937 was capable of condonation and revival (see *Blandford v. Blandford*,¹⁴ where adultery and desertion for two years were condoned and held to be revived by subsequent adultery, and *Paine v. Paine*,¹⁵ where the same decision was reached in a case of desertion created by failure to comply with a decree of restitution of conjugal rights), yet a current period of desertion is on a different footing since it can be determined at any time by the return of the offending spouse and the deserted spouse has at least in the case of simple desertion no alternative but to receive the deserter. The question in such a case is not primarily one of condonation, but whether the desertion has been terminated, either by a resumption of cohabitation involving a bilateral act or by the deserted spouse refusing to receive his or her partner, thereby turning himself or herself into the deserter.

Conduct can always be looked at in the light of past history which throws light upon it, and acts of minor significance in themselves may in the light of past history be of serious import. In this case the conduct of the husband after and during an admitted resumption of cohabitation can be looked at in the light of his previous desertion in order to form a judgment as to whether such conduct amounts to constructive desertion. It is only in this way that I would draw any distinction between acts of greater and those of less significance in connexion with the origination of a fresh period of desertion.

The fourth point raised by the appeal depends on the validity of the contention that the justices have departed from the principle that the court in allotting maintenance should, in the absence of special circumstances, endeavour to put the wife as nearly as possible in as good a financial position as she occupied

¹⁴ (1883) 8 P. D. 19.

¹⁵ [1903] P. 263.

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before the separation. Reliance was placed on *Cobb v. Cobb*,¹⁶ a decision of the Divisional Court and therefore binding on the court from which this appeal is taken, as setting up the further proposition that the courts of summary jurisdiction should follow the practice of the Divorce Courts and make the wife's income up to one-third of the joint incomes of the spouses. It is, however, clear from the language of Sir Francis Jeune that he purported to lay down no hard and fast rule—indeed he said so in terms—and the decisions of the Court of Appeal, *Stibbe v. Stibbe*¹⁷ and *Sherwood v. Sherwood*,¹⁸ have made it abundantly clear that no such rule is consistent with the language of the statute under which maintenance is paid in divorce.

Unless it is shown that the justices have made an error in principle by taking into account something which ought not to be so taken or leaving out of account something which they ought to have considered, or that the figure is wholly erroneous, in my judgment their order should stand.

It is to be remembered that since the passing of the Money Payments (Justices Proceedings) Act, 1935, it is open to a man who finds the burden of an order too onerous to apply to the same court to vary the order without fresh evidence. It is not, I think, a valid objection to this reminder to say that a man will not expect a very sympathetic hearing from the justices before whom he has recently appeared if without fresh evidence he makes such an application. I think that justices can be trusted to deal with applications of this kind fairly and that the intention of Parliament that they should do so is clear from the omission in the later Act of the need for fresh evidence which appeared in the Summary Jurisdiction Act, 1895, s. 7.

In this case the appellant has not shown that the justices erred in principle or that the amount is wholly erroneous, and I do not think that the amount fixed by them should be disturbed.

For these reasons, in my judgment the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Ward, Bowie & Co., for A. V. Hammond & Co., Bradford; Young, Jones & Co., for James A. Lee and Priestley, Bradford.*

A. W. G.

¹⁶ [1900] P. 294.

¹⁸ [1928] P. 215.

¹⁷ [1931] P. 105.

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Husband and Wife—Divorce—Petition within three years of date of marriage—Leave to present—Jurisdiction of special commissioner to grant leave—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 70 (5)—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 2 (1)—Matrimonial Causes (Special Commission) (No. 2) Order, 1946 (S. R. & O., 1946, No. 2112/L.28), Art. 1 (1)—Matrimonial Causes Rules, 1950 (S.I. 1950, No. 1940/L.27).

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An application by originating summons under r. 2 (1) of the Matrimonial Causes Rules, 1950, for leave to present a petition for divorce before the expiration of three years from the date of the marriage, is a matter "connected with" a matrimonial cause, within section 70 (5) of the Supreme Court of Judicature (Consolidation) Act, 1925, and a special divorce commissioner has jurisdiction under the proviso to section 2 (1) of the Matrimonial Causes Act, 1950, to make an order granting leave.

Decision of Wallington J. in *Ambler v. Ambler* [1951] 1 All E.R. 980 overruled.

APPEAL from Judge Wethered, sitting as special divorce commissioner.

The parties were married in June, 1950. In 1951 the husband, wishing to obtain a divorce, applied by originating summons to Commissioner Judge Paton for leave to present a petition within three years of the marriage. The commissioner gave leave to present the petition, but when the petition came before Judge Wethered he referred to section 70 (5) of the Supreme Court of Judicature (Consolidation) Act, 1925,¹ and following a decision

¹ Supreme Court of Judicature (Consolidation) Act, 1925, s. 70 (5), provides: "A commissioner acting under a commission of assize or any other commission issued under this section shall, subject to rules of court, have power to try and determine matrimonial causes of any prescribed class and any matters arising out of or connected with any such causes, and shall for that purpose have all such powers and duties as are vested in the Probate Division under the enactments (including this Act) relating to matrimonial causes and matters."

Matrimonial Causes (Special Commission) (No. 2) Order, 1946, by rule

1 (1) provides: "All classes of matrimonial causes may, subject to rules of court, be tried and determined by a special commissioner, acting under a special commission."

Matrimonial Causes Act, 1950, s. 2 (1): "No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of the marriage: Provided that a judge of the court may, upon application being made to him in accordance with rules of court, allow a petition to be presented before three years have passed" [if in his opinion certain conditions are satisfied].

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of Wallington J., sitting at Leeds Assizes, in *Ambler v. Ambler*,² held that he had no jurisdiction to try and determine the cause. Wallington J. had said that it was plain that the matter did not "arise out of" a matrimonial cause because there was no such cause in existence when the order was made. Further, it seemed to him that the words "connected with any such cause" in section 70 (5) were inserted to indicate that once there was a matrimonial cause in the hands of a commissioner he had authority to determine any matter connected with it. He did not understand how anything could arise out of or be connected with a non-existent thing.

The husband appealed on the ground that the words "connected with" in section 70 (5) of the Act of 1925 were adequate to cover any future or contemplated matrimonial cause, and that Wallington J. had taken too narrow a view of the section.

When the appeal came before the court on December 4, 1951, their Lordships directed an adjournment to enable the King's Proctor to be represented.

H. S. Russell for the husband.

P. Colin Duncan for the King's Proctor. The decision of Wallington J., if allowed to stand, may have serious and far-reaching consequences. The point is not free from difficulty. Until *Ambler v. Ambler*³ it was assumed that a commissioner had discretion to make an order giving leave to present a petition. If Wallington J. is right nobody can exercise this discretion outside London. Section 70 (5) applies to all persons exercising jurisdiction outside London. Prima facie there is much to be said for the judge's decision, because it is difficult to see how anything can arise out of something which is not in existence. The court, however, has to consider whether the judge was putting too narrow a construction on the words "matrimonial cause." The prima facie use of the word "cause" may have led him to arrive at the conclusion he did, but he did not have the benefit of a full argument as to the meaning of "cause." It is open to this court to give a wider meaning to the words of the section, having regard to the view expressed by other courts. In *In re Nanaimo Community Hotel Ltd.*⁴ the Canadian courts held that the statutory phrase "to determine all questions in connexion with an "assessment" conferred jurisdiction to determine all matters

² [1951] 1 All E.R. 980.

⁴ [1944] 4 D.L.R. 638.

³ Ibid.

leading up to, or which might lead up to, an assessment, or were intended to do so. It is, of course, not binding as a decision on this court, but, it is submitted, it is very helpful.

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SOMERVELL L.J. This is an appeal from Judge Wethered, sitting as a special commissioner, who decided, in circumstances which will emerge, that he had no jurisdiction to entertain divorce proceedings. The parties were married on June 24, 1950. It is provided by section 2 of the Matrimonial Causes Act, 1950, that no petition for divorce shall be presented to the High Court unless at the date of the presentation three years have passed since the date of the marriage. Then there is a proviso that a judge of the High Court may, upon application being made to him in accordance with rules of court, allow a petition to be presented before three years have passed if in his opinion certain conditions are satisfied. The husband wished to seek a divorce within the three years, and, therefore, sought to make an application under that section. He made it to Judge Paton, sitting as a commissioner. [His Lordship read section 70 (5) of the Supreme Court of Judicature (Consolidation) Act, 1925, and continued:] Under the Matrimonial Causes (Special Commission) (No. 2) Order, 1946, made by virtue of the subsection which I have read, all classes of matrimonial causes may, subject to rules of court, be tried and determined by a special commissioner acting under a special commission. The question that arises in this case is whether, having regard to the words of section 70 (5), a commissioner, having the powers derived from article 1 (1) of the order, can, under it, exercise the power given under the proviso to section 1 (1) of the Matrimonial Causes Act of 1937.

That matter came before Wallington J. at Leeds Assizes in *Ambler v. Ambler*⁵ in 1951. The headnote reads: "A special divorce commissioner has no jurisdiction to make an order under the Matrimonial Causes Act, 1937, s. 1 (1), giving leave to present a petition for divorce before the expiration of three years from the date of the marriage, since at the time when the application for the order is made no matrimonial cause is in existence, and, consequently, the application cannot be a matter 'arising out of or connected with' any such cause within section 70 (5) of the Supreme Court of Judicature (Consolidation) Act, 1925." Section 1 (1) of the Act of 1937 was the predecessor of section 2 (1) of the Act of 1950.

⁵ [1951] 1 All E.R. 980.



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In the course of his judgment the judge, after setting out various statutory provisions, said: "It is plain that this matter "does not 'arise out' of a matrimonial cause, because there was "no such cause in existence when the order was made. Further- "more, it seems to me that the words 'connected with any such " 'causes' in section 70 (5) are inserted to indicate that once "there is a matrimonial cause in the hands of a special commis- "sioner he has authority to determine any matter arising out of "it or connected with it. I do not understand how anything can "arise out of or be connected with a non-existent thing."

When the present case came on we adjourned it in order that the King's Proctor might have an opportunity of making his submissions to us, and we have had the advantage not only of the original submissions by Mr. Russell, but the submissions made on behalf of the King's Proctor by Mr. Duncan, and I have no doubt we have had a fuller argument and been referred to some authorities, in particular, a Canadian authority, which, of course, is not binding, but which is, if I may say so, very helpful. One appreciates, of course, the force of the judge's view that, for a matter to be connected with a cause you would think, at any rate at first sight, that there must be a cause for it to be connected with; but regarded as an ordinary English expression I think I would have said, though it would not necessarily decide the construction of the words in this section, that "connected with" can naturally be used to describe a relation with a contemplated event which is still in futuro. I need not, however, attempt to elaborate that in my own words, because we have had the advantage of being referred to what was said by certain Canadian judges in a case where a very similar statutory phrase fell to be construed.

The case of *In re Nanaimo Community Hotel Ltd.*⁶ came before the British Columbia Supreme Court in Chambers. The statutory phrase which fell to be construed had this context, "The Exchequer Court shall have exclusive jurisdiction to hear "and determine all questions that may arise in connexion with "any assessment made under this Act," and it was argued that that could not confer any jurisdiction until there had been an assessment. But McFarlane J. held that that was wrong, and that the phrase covered matters leading up to or which might lead up to or were intended to lead up to an assessment. He puts it in this way: "Mr. Cunliffe argues that that "section presupposes that an assessment has been made and

⁶ [1944] 4 D.L.R. 638.

“ that, as I understand him, the words ‘ in connexion with ’
 “ mean ‘ consequent upon.’ I do not think that is the correct
 “ construction to be put upon these words. One of the very
 “ generally accepted meanings of ‘ connexion ’ is ‘ relation between
 “ ‘ things one of which is bound up with or involved in another,’
 “ or, again, ‘ having to do with.’ The words include matters
 “ occurring prior to as well as subsequent to or consequent upon
 “ so long as they are related to the principal thing. The phrase
 “ ‘ having to do with ’ perhaps gives as good a suggestion of the
 “ meaning as could be had. I think section 66 is sufficient to
 “ oust the jurisdiction of this court to deal with a decision on
 “ which an assessment is subsequently made.”

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That case went to the Court of Appeal, and Robertson J.A.
 said⁷: “ To my mind, the language ‘ in connexion with any
 “ ‘ assessment ’ clearly covers all the preceding steps leading up
 “ to the assessment being made ”; and Sidney Smith J.A. said⁸:
 “ I agree with Mr. Justice McFarlane that the words of section 66
 “ ‘ include matters occurring prior to as well as subsequent to
 “ ‘ or consequent upon so long as they are related ’ to the
 “ assessment.”

Of course, it may be that it was plain that there was going
 to be an assessment, whereas when an application is made under
 section 1 (1) it is not plain that there is going to be a cause,
 because the court may refuse to grant leave under the proviso;
 but, nevertheless, I have myself found what was stated by
 McFarlane J. and approved by the Court of Appeal very helpful
 in deciding this case. I have come to the conclusion that these
 words “ in connexion with a matrimonial cause ” do include the
 application which has to be made under what was section 1 (1)
 of the Act of 1937, in respect of a petition which is sought to be
 filed within the three years. That seems to me to be a natural
 meaning. I think one would say that such an application was
 in connexion with a matrimonial cause, and, therefore, I think
 this appeal must be allowed.

Mr. Duncan also argued that having regard to the definitions
 to be found in section 225 of the Supreme Court of Judicature
 (Consolidation) Act, 1925, an application under section 2 (1) of
 the Act of 1950 would be able to be entertained by anyone who
 had power to try and determine matrimonial causes, even if the
 later words “ arising out of ” or “ connected with ” were not
 there. He sought to rely on certain words that can be found

⁷ [1945] 3 D.L.R. 225, 250.⁸ Ibid. 261.

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in the definition of "matrimonial cause," which means "any action for divorce, nullity of marriage, judicial separation, jactitation of marriage or restitution of conjugal rights," reading, as he submitted, into that definition the definition of "cause" and the definition of "action." Those themselves must be read with regard to the definition of the word "plaintiff." I think there is some difficulty, having regard to the form of the definition of "matrimonial cause," at any rate, in bringing in some of the matters which Mr. Duncan sought to bring in; but, speaking for myself and without relying on any of the special words in the definition on which he sought to rely, I would have thought there was a good deal to be said for the contention that a power to try and determine matrimonial causes by itself conferred a power to deal with applications under what was section 1 of the Act of 1937. It is unnecessary for us to decide the point, because we have the wider words "connected with," but it has been argued and, speaking for myself, I think there is a good deal of force in it.

For those reasons, I think this appeal must be allowed.

JENKINS L.J. I agree. This case is in effect an appeal from the decision of Wallington J. in *Ambler v. Ambler*,⁹ which decided the very same question. As has been pointed out, that was a decision under the Matrimonial Causes Act, 1937, s. 1 (1), whereas the relevant section in the present case is section 2 (1) of the Matrimonial Causes Act, 1950. There is, however, no material distinction between the two sections for the purposes of the point at issue. The question raised is a very short question of construction, on which there is very little that I can usefully add to what my Lord has said, but, as we are differing from Wallington J. in the matter, I think it right that I should give my reasons briefly in my own words.

It is not in dispute that the Matrimonial Causes (Special Commission) (No. 2) Order, 1946, delegated to the commissioners all powers capable of being delegated to them under the provisions of section 70 (5) of the Supreme Court of Judicature (Consolidation) Act, 1925. The question is whether, upon its true construction, subsection (5) of section 70 authorizes the delegation to commissioners of power to deal with this particular type of proceeding, namely, an application for leave to present a petition before the expiration of the minimum period of three years from the marriage.

⁹ [1951] 1 All E.R. 980.

[The learned Lord Justice read subsection (5) and continued :] Wallington J. decided against the view that commissioners had jurisdiction in relation to these applications for leave, on the short ground that the application for leave is made at a stage when the proposed petition has not yet been presented and, therefore, at a stage when it may be said that the actual cause which is intended to be brought is not yet in being; and he took the view that such an application for leave could not be said to arise out of or be connected with any cause because no cause was in existence. With respect to him, I regard that as too narrow a view of subsection (5), both looking at the matter from the point of view of strict construction and giving each word no more and no less than what seems to be its normal meaning, and also looking at it from the rather wider standpoint of the apparent intention of the subsection read as a whole. There may be difficulty in speaking of a matter as "arising out of" a cause not yet on foot, but I for my part see no reason whatever why an application such as this should not be "connected with" the proposed matrimonial cause. I think that is a perfectly proper and natural use of the expression, and I agree with my Lord that this view is strongly supported by the Canadian authority to which we have been referred.

Looking at subsection (5) as a whole, one finds it is in two branches: first it provides that "a commissioner acting under "a commission," and so on, shall "have power to try and "determine matrimonial causes of any prescribed class and any "matters arising out of or connected with any such causes"; and secondly it provides that a commissioner "shall for that purpose"—that is to say, for the purpose of trying and determining matrimonial causes of any prescribed class and any matters arising thereout or connected therewith—"have all such powers and "duties as are vested in the Probate Division under the enactments (including this Act) relating to matrimonial causes and "matters."

The subsection being framed in that way does, to my mind, strongly suggest, when it is looked at as a whole, that the intention of the legislature was to enable commissioners to be invested with all the powers of the Probate Division for the purpose of trying matrimonial causes, or matrimonial causes of any prescribed class, so as to authorize them to deal with business of that kind and with all matters incidental to the dispatch of such business as if they were sitting as judges of the appropriate division of the High Court. Looked at from that point of view, it seems to me

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that the subsection does on its natural construction authorize the delegation to commissioners of the fullest powers in relation to the trial and determination of matrimonial causes, or those of any prescribed class, including the disposal of all such incidental matters as an application for leave in circumstances such as those of the present case, these being all comprehensively described as "matters arising out of or connected with any such causes," and also, I think, included in the second branch of the subsection, which invests commissioners with all the powers and duties of the Probate Division for that purpose; that is to say, for the purpose of trying and determining matrimonial causes of any prescribed class, and any matters arising thereout or connected therewith.

Speaking for myself, I prefer to base my decision on the meaning of the words "connected with" in this context rather than on the view that an application for leave should be regarded as in itself a matrimonial cause within the meaning of section 225, the definition section. But I agree that the definition of "matrimonial cause," read in conjunction with that of "cause," is a very comprehensive one and I think it might conceivably be possible, if the true view was that such an application was not a matter "connected with" a matrimonial cause, to reach the conclusion that in such case it should be classified as constituting in itself a particular species of matrimonial cause.

I may perhaps add that, as it seems to me, our decision does, at all events, have the merit of convenience. Administrative difficulties should not, as a general rule, be taken into consideration in construing a statute, but it does appear that the result we have reached is, from a practical point of view, the more reasonable and convenient one. I agree that the appeal should be allowed.

HODSON L.J. I agree. The commissioner felt himself bound (as indeed he was) by a decision of Wallington J. in *Ambler v. Ambler*.¹⁰ That judge felt himself constrained to hold, on the construction of section 70 (5) of the Supreme Court of Judicature Act, 1925, that the words "arising out of or connected with any such causes," such cause being a matrimonial cause, were not wide enough to cover an originating summons taken out before the cause had come into existence. After hearing the argument of counsel for the appellant and for the King's Proctor, I also have come to the conclusion that that view was too narrow a one.

¹⁰ [1951] 1 All E.R. 980.

It is conceded by the appellant in argument that this originating summons could not be said to arise out of the cause, but he argued (I think convincingly) that it was connected with the cause.

I would only mention one argument to which I think my Lords have not yet referred: the matters which are ancillary to the petition and come into existence after the petition may all, I think, be said to arise out of the petition, and if that is so, it is difficult to give any force to the words "connected with" unless those words cover such an application as this. I agree with the reasons given by my Lords for allowing this appeal on the ground that the words "connected with" are wide enough to cover the application in question, but I would also like to leave open for favourable consideration the argument, which may affect the construction of some of the rules to which we have been referred, that this appeal could be allowed on the ground that the originating summons in question is itself a cause.

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Appeal allowed.

Solicitors: *Hillier, Naish & Co., Bath; King's Proctor.*

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Jan. 15.

Husband and wife—Maintenance—Divorce—Conduct of wife after divorce—Meaning of "adultery"—Justices' discretion to keep order alive after decree—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 7—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 19.

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After the dissolution of her marriage on the ground that her husband had deserted her a woman who had continued to rely on a maintenance order made during her marriage by a court of summary jurisdiction was found by the justices to have had sexual intercourse with a married man. The justices revoked the order without deciding whether or no the sexual intercourse amounted to adultery, holding that there was fresh evidence on which the order could be discharged, irrespective of whether or not the woman had committed "adultery":—

Held, that in view of the charge which had been made, and the question of interpretation which had arisen, this was essentially a case where the court should exercise its discretion to discharge the

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order, and leave the woman to her remedy in the High Court. As between the two tribunals there could be no reasonable doubt which should be preferred, namely, that tribunal which had under section 19 of the Matrimonial Causes Act, 1950, an unfettered jurisdiction to go into all the circumstances, and to assess deliberately the true bearing of every part of the divorced wife's conduct on questions of maintenance and custody.

The principles in *Bragg v. Bragg* [1925] P. 20 considered and applied.

Per Karminski J.: The true test as to whether the sexual intercourse amounted to adultery is this: When the woman took part in an act of sexual intercourse with the married man was she then dishonouring or defiling her own marriage bed, or that of the man with whom the intercourse took place? Clearly, so far as the woman was concerned, she could not be defiling or dishonouring her own marriage bed, because as a single woman she had no marriage bed and no married home; but so far as the man was concerned, he was a married man, and if she had sexual intercourse with him she was committing adultery because she was defiling or dishonouring the marriage bed of that man and his wife. That being so, it must follow that the sexual intercourse which the justices found had taken place amounted to adultery on the part of the woman.

APPEAL from the justices for the city of Bradford.

In 1944 the wife obtained a maintenance order on the ground that her husband had deserted her. There was no resumption of cohabitation between the parties after the making of the maintenance order. In due course the wife took divorce proceedings against the husband on the ground of desertion and she was granted a decree nisi which was made absolute in September, 1948.

On February 12, 1951, the husband applied to the justices for the discharge of the maintenance order on the ground that the wife had committed adultery. The man with whom the adultery was alleged to have been committed, Rayner, was a married man. The adultery was alleged to have taken place "during the past "12 months," that is, since the date of the decree absolute; and the question therefore arose whether the wife, having ceased to be a married woman, was a person who could commit "adultery" within the meaning of section 7 of the Summary Jurisdiction (Married Women) Act, 1895,¹ or at all.

¹ Section 7 of the Summary Jurisdiction (Married Women) Act, 1895 (as amended by s. 2 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, and s. 1 (1) [as to amount] of the Married Women (Maintenance) Act, 1949):

"A court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, in which any order under this Act or the Acts mentioned in the Schedule hereto, or either of them, has been made, may, on the

The justices, in their reasons for their decision, stated:—

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“(1) Section 7 of the Summary Jurisdiction (Married Women) Act, 1895, gives to us a discretion upon cause being shown upon fresh evidence to the satisfaction of the court at any time to alter, vary or discharge any such order.

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“(2) *Bragg v. Bragg*,² to which our attention has been directed, establishes that in law authority to exercise our discretion in relation to such an application as this after (as in this case) a decree absolute has been granted.

“(3) We were of opinion that there was an abundance of fresh evidence (apart from any question of adultery, misconduct or sexual intercourse) upon which we could entertain such an application to revoke an order and to exercise our discretion. We were satisfied that the financial position of Mrs. Abson had materially improved.

“(4) We did not believe for one moment the evidence given by the defendant. . . . We were of the opinion that the financial benefit accrued to her by reason of the arrangement admittedly entered into between her and [the married man] was greater by far than 5s. a week. We were asked to believe that she provided an office, dealt with his correspondence, kept his books, and watched over his financial affairs and had the telephone installed in her house all for 5s. per week.

“(5) We came to the conclusion that there was ample evidence apart from the business relationship existing between the [married man and the wife] to prove conclusively that over a long period of time sexual intercourse had been taking place between them . . . and [that it was] in our view a relationship to Mrs. Abson's financial advantage.

“application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed the weekly sum of five pounds. If any married woman upon whose application an order shall have been made under this Act . . . shall voluntarily resume cohabitation with her husband, or shall commit an act of

“adultery, such order shall upon proof thereof be discharged: Provided that the court may, if the court think fit—(a) refuse to discharge the order if, in the opinion of the court, such act of adultery as aforesaid was conduced to by the failure of the husband to make such payments as in the opinion of the court he was able to make under the order; and (b) in the event of the order being discharged, make a new order that the legal custody of the children of the marriage shall be committed to the wife. . . .”

² [1925] P. 20.

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“(6) That [the married man’s] evidence was as unreliable as Mrs. Abson’s. . . .

“(7) That having regard to the foregoing we unanimously came to the conclusion that there was an abundance of fresh evidence upon which to exercise our discretion and to revoke this order. . . .

[The justices stated that they purposely avoided the making of a fresh order in favour of the child of the marriage, adding that it would be preferable for an application to be made under the Guardianship of Infants Acts.]

“(12) We were not unduly perturbed by the argument so ably advanced by Mr. R. M. Priestley (on behalf of the defendant) on the question as to whether having regard to the changed status of his client this court was competent to deal with the question of her ‘adultery.’ The matter in issue so far as this court was concerned was not whether or not the defendant had committed adultery but simply whether on the application before us there was fresh evidence upon which we could revoke this order. We found that there was, and in so doing comprehensively took all the circumstances into consideration, including (inter alia) the defendant’s conduct.”

James Stirling for the wife. While conceding that there was evidence on which the justices might have found that the wife had had sexual intercourse with the man concerned (though not admitting that it had taken place), that intercourse was not “adultery,” for she was a single woman at the time. But even if it were held to amount to adultery, in the sense in which it is frequently used in the Divorce Court—see, for example, section 5 of the Matrimonial Causes Act, 1950—that usage is merely convenient terminology and is not applicable to the “adultery” contemplated in section 7 of the Summary Jurisdiction (Married Women) Act, 1895. [He referred to the definitions of adultery in the Shorter Oxford English Dictionary, Webster’s Dictionary, and the New English Dictionary, in which a distinction is made between “single” and “double” adultery.]

The husband did not appear and was not represented.

LORD MERRIMAN P. This appeal by a wife against the decision of the justices for the city of Bradford to discharge an order made in her favour raises an interesting and important question. The husband respondent to this appeal, although he was granted a certificate under the Legal Aid and Advice Act, 1949, has chosen

not to avail himself of the facilities granted, and is neither present nor represented here, and we have, therefore, had no argument on his part. Mr. Stirling, on behalf of the appellant, has, however, put all the facts before us with his customary clarity and candour, and I think that we are fully in a position to deal with the case.

[His Lordship stated the facts and continued:] At the very outset of the case it was suggested that the justices had no jurisdiction because she had ceased to be a married woman, and, therefore, that the provisions with regard to the forfeiture by a married woman of her order which appear in section 7 of the Summary Jurisdiction (Married Women) Act, 1895, as amended by section 2 of the corresponding Act of 1925, no longer applied. This is, I think, a convenient moment at which to indicate the nature and effect of that argument. It is one that was used in 1925 in *Bragg v. Bragg*,² and if it prevails for one purpose it may very well prevail for all purposes, and deprive the justices altogether of jurisdiction to deal in any shape or form with the matrimonial affairs of a couple once a decree of divorce has been made absolute. Undoubtedly on the language of the various Acts of Parliament in the summary jurisdiction code it is possible to spell out an argument to that effect. But that submission was rejected by this court in *Bragg v. Bragg*,² and the decision in that case that justices still have a discretion to exercise their functions with regard to a pre-existing order notwithstanding a divorce has been repeatedly approved. But it has been emphasized that it is very much a matter of discretion, and I do not think that it is necessary to go into an elaborate review of the authorities on this matter, because I think that the whole question is fairly summarized in a judgment of this court in *Prest v. Prest*.³ That case raised a different issue in connexion with the resumption of cohabitation; but, in the course of deciding it we reviewed the authorities in which *Bragg v. Bragg*² had been considered, and, if I may quote from my own judgment, it was said³: "The effect, therefore, of *Bragg v. Bragg*² is that it is a "matter of discretion whether or not, in the circumstances of "any given case, the justices should discharge, as against a wife "whose marriage has subsequently been dissolved, an order "made while she was truly the wife of the husband. But this "court has frequently emphasized that it is not a discretion to "be exercised arbitrarily or capriciously but judicially." I

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² [1925] P. 20.³ [1950] P. 63, 68.

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referred in my judgment to three cases—*Mezger v. Mezger*,⁴ *Kirk v. Kirk*,⁵ and *Wood v. Wood*⁶—on the facts of which this court decided expressly or impliedly that the discretion was one which could only be exercised in one way, namely, by discharging the order under the Summary Jurisdiction Acts.

I think that the same reasoning applies to this particular case, but in order to make it clear why I say so I must now add one or two other facts. The cardinal fact in this case is that Mr. Rayner is a married man. That fact was early pointed out to the justices when they were asked to say that they should not exercise their jurisdiction, and it became more abundantly clear in the course of the case when Rayner's wife came to give the principal evidence on the issue whether, to use a purely neutral phrase, sexual intercourse had or had not occurred between her husband and the appellant in this case. But it was argued in the court below that since Mrs. Abson had divorced her husband she was no longer a married woman within the meaning of the Summary Jurisdiction (Married Women) Act, 1895, and she was not, therefore, a person who could commit adultery within the meaning of that Act, or, to put it another way, that adultery within that Act, at any rate for the purpose of section 7, means something different from an act of adultery which would be charged against her as the woman named, for example, in the divorce suit, if such a suit were started, between Mrs. Rayner and her husband. Pressed to its logical conclusion, that might cut at the root of the very beneficent decision in *Bragg v. Bragg*,⁷ because it might prove too much, even from the point of view of the appellant in this case; and I am bound to say that even for the purposes of the Summary Jurisdiction Acts regarded by themselves, I think it does raise difficulties, because, as we all know, it is now open to either a husband or a wife to obtain a separation order on the ground of her or his adultery. To illustrate the point, suppose that the cases of two married couples are before the court on the same day, in each of which a separation order is claimed in respect of what is, in effect, the same act of adultery as between the guilty spouses respectively. If the argument is reduced to its logical conclusion, it is not disputed that those spouses would have committed adultery; yet, if there is an additional charge against one of them of committing adultery with an unmarried person, it would follow that such person was

⁴ [1937] P. 19.⁶ [1949] W.N. 59.⁵ [1947] W.N. 161; 63 T.L.R.⁷ [1925] P. 20.

not an adulterer or adulteress within the meaning of the Acts. But I think that is only saying the same thing over again, namely, that what is really being contended for is that there are two separate meanings of adultery, one which is the recognized meaning in the Divorce Court, where it does not matter in the least (as I understand the law) whether a third party named as the adulterer or adulteress is or is not married, and another in the summary jurisdiction court where it does matter. However, let it be plainly understood that Mr. Stirling has reserved the right to argue that a divorced wife cannot commit adultery with a married man within the meaning of the Summary Jurisdiction Acts.

I am absolved from any elaborate review of the facts because Mr. Stirling, while maintaining the wife's denial made before the justices that she had committed adultery, did not dispute, for the purposes of this appeal, but without prejudice to his right to dispute the facts elsewhere, that there was sufficient evidence in law to entitle the justices, as they did in effect, so to find. I propose, therefore, to deal with this case on the basis that for the moment it is assumed, whether it is called adultery or whether it is not, that the wife had sexual intercourse, as alleged, with the married man Rayner. That brings me to the point that if that fact does convict Mrs. Abson of adultery within the meaning of section 7 of the Summary Jurisdiction (Married Women) Act, 1895, there is no more to be said about the matter, because the obligation to set aside the order is absolute, unless a discretion is given in terms of the proviso added by section 2 of the Act of 1925, which clearly does not apply in this case.

I think, however, that there is another and more important question than that, which we can decide without resolving this conundrum whether there are two different meanings of adultery for the purposes of the Divorce Court and the courts of summary jurisdiction, and that is, whether this is a proper case, within the decision in *Bragg v. Bragg*⁷ and the cases in which *Bragg v. Bragg*⁷ has been followed, for the justices to exercise their discretion whether or not to keep this order alive.

That brings me necessarily to a consideration of the alternatives. I have already said that if what Mrs. Abson is assumed, for the purposes of this judgment, to have done, is to have committed adultery, there is an end of the matter, for the justices would be absolutely bound to set this order aside without any

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argument at all. But, on the other hand, if she were to exercise, or had exercised, her right to apply for maintenance in the Divorce Court, after obtaining the decree, then it would be a matter, not of absolute obligation, but for judicial consideration, whether in all the circumstances it was or was not a case in which an order should be made in the first instance, or, if an order had been made in the first instance, it should be cancelled or modified in any way because of the course of conduct which is alleged against her. As between these two tribunals it seems to me that there cannot be any reasonable doubt which should be preferred, and that is the one which has a perfectly free jurisdiction to go into all the circumstances of the case, and to assess deliberately the true bearing of every part of the divorced wife's conduct on the questions of maintenance for herself and the custody of the child. About custody, let me say that the justices, having found the facts against her, deliberately refrained (as I think very wisely) from making a further order with special reference to custody under the proviso added to section 7 by section 2 of the Act of 1925.

I am reinforced in my view that the proper tribunal to deal with this matter is a court of this Division (and I hope that in spite of the lapse of three years it is still not too late for that tribunal to deal with the matter, having regard to the fact that an order has been in existence and has been acted upon in the meanwhile until this particular summons was served) by what has actually happened before the justices. Confronted, as I have said, with the argument that adultery was not adultery, at any rate in relation to Mrs. Abson, they have been careful to find merely that she has had sexual intercourse with this married man. But they have also held that it is quite irrelevant to their decision whether this is adultery or not, that the circumstances in which these parties are said to have lived together were such that it was quite manifestly of great financial benefit to the wife, and that apart altogether from any question of impropriety or anything of that sort, it was clearly a case for setting aside this order; and they did not feel in the least perturbed by the submission made with regard to the adultery point. I must say, giving full credit to the Bradford justices for a very careful and patient hearing, and for the admirable way in which they have put us in full possession of the points at issue, that I think this is a case which had better be dealt with on realities, and not on shadows, because, to put it plainly, that is really burking the issue. It is no use saying that one is not perturbed by the point

that a proved act of sexual intercourse by a divorced wife with a married man need not necessarily be held to be adultery within the meaning of the Summary Jurisdiction Acts when those Acts demand that if it is adultery there is no option but to discharge the order on that ground. In other words, my view of the matter is that the moment this issue appeared, at the very outset of the case, the justices should have said: "This is not a case for us to keep this order alive. Never mind what the facts are proved to be; there is a charge of adultery against one who was a married woman when the order was obtained, and is now a divorced woman. That raises all the complications inherent in the line of authorities beginning with *Bragg v. Bragg*." I think they should have said that this was essentially a case within that line of authorities in which the court should exercise its discretion to discharge the order and leave the wife to her remedies in the Divorce Court. They did not take that view. But it is a view which is plainly open to us if we think that they did not properly exercise their discretion, meaning, of course, their discretion within the meaning of the *Bragg v. Bragg*⁷ line of authorities.

The result is the same. In my opinion the appeal must be dismissed and the order discharged, but for the reasons I have given. That is the way the matter should be dealt with and the wife left to whatever remedies she may have under the ordinary law of divorce.

KARMINSKI J. I entirely agree with the judgment of my Lord.

The justices found as a fact, after considering a fair volume of evidence, that for a long period of time sexual intercourse had taken place between the appellant, Mrs. Abson, and a man called John Thomas Rayner. At the time of the taking place of this sexual intercourse it was clear that the appellant was no longer a married woman, but was, in fact, a feme sole, because in September, 1948, she had been granted a decree absolute dissolving her marriage with the respondent.

It was argued that under those circumstances she could not be guilty of adultery at any rate within the meaning of section 7 of the Summary Jurisdiction Act, 1895. So far as that argument is concerned, I think it is useful to look at section 3 of the Matrimonial Causes Act, 1950, which provides as to the making of an adulterer a co-respondent, and also directs that when a petition

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⁷ [1925] P. 20.

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for divorce is "presented by a wife on the ground of adultery " the court may, if it thinks fit, direct that the person with whom " the husband is alleged to have committed adultery be made a " respondent." Neither subsection of section 3 makes it a term that the alleged adulterer should himself or herself be a married person.

In my view the true test is this: when Mrs. Abson took part in an act of sexual intercourse with John Thomas Rayner was she then dishonouring or defiling her own marriage bed, or that of the man with whom the intercourse took place? Clearly, so far as Mrs. Abson was concerned, she could not be defiling or dishonouring her own marriage bed, because she, as a single woman, had no marriage bed and no married home; but so far as Rayner is concerned, he was, and, I think, still is, a married man, and if she had sexual intercourse with him she was committing adultery, because she was defiling or dishonouring the marriage bed of Mr. and Mrs. Rayner. The justices having found that sexual intercourse did take place, it follows that that sexual intercourse amounted to adultery on the part of the appellant, Mrs. Abson.

My Lord has emphasized, and I venture to repeat the emphasis, that in a case of this kind the High Court is the suitable tribunal to investigate the claim, if any, by the wife for maintenance. The fact that a wife has committed adultery is not, of course, an absolute bar to a court awarding her maintenance on the dissolution of her marriage. Section 19 of the Matrimonial Causes Act, 1950, lays down what facts the court is to take into consideration, and amongst those facts is the conduct of the parties. In many cases the wife comes to the court and asks for maintenance although she herself has committed adultery during the marriage, and has had to seek the discretion of the court to be exercised in her favour because of that adultery. That, of course, is a factor which has to be taken into consideration. Similarly, it has been held that the conduct of the parties after decree must also be considered, and there is no doubt that adultery by a petitioner wife after the dissolution of her marriage is also a matter for consideration.

The High Court, therefore, has the power, and, indeed, the duty to consider the conduct of the parties, whereas under the Summary Jurisdiction Acts, once the wife has committed adultery then her order for maintenance must be discharged. I venture to repeat my entire agreement with my Lord that in

cases of this kind the suitable and proper tribunal to inquire into the matter is the High Court.

I only add this, that in my view this is a case where the wife should seek permission of the court to lodge her application for maintenance, although in fact some three years have elapsed since she ought to have done so; but, as my Lord has pointed out, she was then in the enjoyment of an order under which payment was being made.

All these factors will no doubt be taken into account by the court to which she applies for leave to make her application out of time.

I agree with my Lord that this appeal must be dismissed.

Solicitors: *Ward, Bowie & Co., for James A. Lee & Priestley, Bradford.*

J. B. G.

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Husband and wife—Maintenance order in court of summary jurisdiction—Divorce proceedings—Prayer for alimony pending suit—Application by wife for discharge of existing order—No conflict of jurisdiction.

Lord
Merriman P.
and
Karminski J.

A wife who is taking divorce proceedings is entitled to pursue her rights for maintenance for alimony pending suit in the Divorce Court provided that she has any existing order for maintenance made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, discharged. But she is under no obligation to apply for the discharge of that order before presenting a petition for divorce; and such an application creates no conflict between the two jurisdictions.

APPEAL from stipendiary magistrate for Leeds.

The parties were married in September, 1946. On November 26, 1946, the wife obtained a maintenance order on the ground that her husband had deserted her, and they never thereafter resumed cohabitation. On September 29, 1950, the wife presented a petition for divorce on the ground that her husband had deserted her for at least three years. The petition contained prayers for alimony pending suit and permanent maintenance. Accepting that she could not have two maintenance orders, one in the High Court and one in a court of summary

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jurisdiction, in force at the same time, the wife, by summons dated September 17, 1951, sought to have the latter revoked. The magistrate refused to discharge the maintenance order, holding that he had no jurisdiction to do so while the divorce suit was pending.

The wife appealed.

Denis H. Robson for the wife.

Norman Stogdon for the husband.

LORD MERRIMAN P. stated the facts and continued:—The wife cannot have two maintenance orders running at the same time, and that is why she has gone to the magistrate to get rid of the old order, presumably because she considers that she is likely to get at least as much as the magistrate could possibly award, even under his extended jurisdiction, by way of alimony pending suit, and may get rather more than that after the decree, if the decree is made absolute in her favour. We have asked in vain for information whether the petition is defended. We do not know. The case is proceeding in the district registry, and the papers are not here. But at least we are entitled to say this, that neither before the magistrate nor before us has there been any hint that the husband has put forward any defence.

The magistrate, who has given a great deal of care and attention to this case, has given a reasoned judgment, saying why he has refused to discharge this order. In substance, without going through all the details, he has said that he does not think that he has jurisdiction to do so because a cause is pending in the High Court, and because a magistrate should not exercise any concurrent jurisdiction in such circumstances; but if he has jurisdiction, he has come to the conclusion that he ought only to exercise it in one way. The reason which obviously appealed to him most was that even the act of considering whether to discharge the order would be some infringement of the jurisdiction of the High Court, albeit that was being done for the express purpose of avoiding a conflict of jurisdiction between the two courts, and it is his view that the proper way to deal with the situation, if this wife chose not to apply for an increase of amount under the recent amendment effected by the Married Women (Maintenance) Act, 1949, which increased the maximum from £2 to £5, would be for her to go to the Divorce Court and apply for alimony pending suit, disclose that the order subsisted, ask the Divorce Court to adjourn for 28 days—not for an indefinite period, but for a definite

period—and then, if the magistrate had set the order aside within that time, go back to the Divorce Court and proceed for the alimony. I am bound to say that I find this line of reasoning wholly unconvincing. I rather sympathize with the magistrate, because the issue was confused for a great part of the hearing before him by what was, in my opinion, a misconception in the way the case was put before him to start with. Originally, the summons was to strike the money award out of the order, while leaving the order itself, that is to say, the finding of desertion, standing. The magistrate was perfectly right, of course, in pointing out that that was absurd; he could not make that variation and at the same time say that it obviated concurrent jurisdiction. Eventually, after the discussion had proceeded for some time, it was decided to amend the summons by asking that the order should be discharged altogether, which was what the application should have been in the first instance.

In my opinion there was no answer to that. A wife who has taken divorce proceedings, a fortiori, if, as in this case, she has incorporated in her petition the claim for alimony pending suit, instead of making it the subject of a separate application, is entitled to pursue her rights for maintenance in the Divorce Court, provided, of course, that she has had any existing order discharged; for, as has been pointed out more than once, she cannot have concurrent orders in her favour in two courts. Although it may appear to be a point of no importance in the case before us, I think that there is a very serious question of principle involved here.

A wife's rights in the Divorce Court are both greater and less than they are before magistrates. Great reliance was placed on the line of decisions beginning with *Bragg v. Bragg*,¹ which decides that even after dissolution of marriage justices may still, in a proper case, exercise their functions with reference to a pre-existing order for maintenance; but nobody has suggested that *Bragg v. Bragg*¹ decided that they *must* do so if the wife wishes to pursue her remedies in the Divorce Court, always provided, of course, that she gets rid of the existing order. The differences to which I was about to allude are these: in the Divorce Court she is entitled, in a proper case, to an order for a secured provision of maintenance; indeed, in the legislation on the subject that provision has always preceded, in the section entitling a wife to maintenance, the provision for unsecured maintenance. Here

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¹ [1925] P. 20.

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—and, of course, I am treating this as a matter of general principle applicable to all cases—she is in a much stronger position. Moreover, there is no top limit, within reason, to the amount of maintenance that may be awarded, whereas there is a statutory limit in the case of a court of summary jurisdiction. At the time when a divorce is granted it may, therefore, plainly be very much more advantageous for a wife, merely from the financial point of view, to obtain provision for her maintenance through the Divorce Court.

But there is another provision which it is very important to remember, and that is that if she does so she must do so on the decree. Giving all the latitude which judges have been inclined, within limits, to give to the word “on,” there are plainly some limits beyond which that word cannot be stretched; and if it were the law that, having obtained an order in a court of summary jurisdiction, a wife ought to be made to abide by it (unless, for example, as was suggested, it is shown that she would be much better off by obtaining an order in the Divorce Court), there might come a time when something happened which would oblige magistrates to cancel the order in their court, and when she might be hopelessly out of time to make application to the Divorce Court. I do not think it is necessary to elaborate on this. It is sufficient to say that it is really elementary that she is entitled, in relation to maintenance, to an absolutely free hand as to what she does about it, subject always to the requirement that she must have the pre-existing order in the magistrate’s court discharged if she decides to apply to the Divorce Court, and to the right of the magistrate’s court, in a proper case, to treat the mere fact of divorce itself as being sufficient in the particular circumstances of a case to justify them in bringing the order to an end, leaving the wife to whatever her rights may be in the Divorce Court.

That is all admitted, and Mr. Stogdon has not attempted to dispute it; but he says that some different principle is to be applied with regard to alimony pending suit. In one sense, of course, there is this difference, that the decree may never be made at all. That, however, is the wife’s risk, and not the husband’s. I cannot myself see that it is anything else but a question whether she makes her choice sooner rather than later. That is all there is in it. She is just as much entitled to ask for her alimony pending suit in the Divorce Court as she is to ask for her ultimate maintenance in the Divorce Court, and I am

completely unimpressed by the difficulty which the magistrate felt that in giving effect to her wish to get rid of the order in her own favour he must actually be exercising a conflicting jurisdiction by giving his mind to it while there is a petition on the file of the Divorce Court. I would point out that there is no escape from that in the sense in which he uses the words "the two courts are in possession of the matter at the same time." Even if the course which he suggests—namely, that of making an application to the Divorce Court, having it adjourned for a specified period and then going back to the magistrate's court to get the order set aside—is the proper solution of the difficulty, the matter is still pending in both courts. There is no escape from it unless the wife does one thing, namely, goes to the magistrate before presenting her petition. In my opinion there is no sort of obligation on her to do that.

Underlying the whole of this case I think that there has been a momentary forgetfulness of the fact that by getting rid of the whole order, getting rid, therefore, of the finding of desertion, and the like, she is not doing the harm which the magistrate thought she would be doing to her case. The petition alleges that the desertion, held to have begun in 1946, had continued until the presentation of the petition. Even on the view that getting rid of the order could do her harm by cancelling a subsisting finding of desertion, it could not affect the issue before the court, provided it is done after the petition is filed. But it has never been hinted or suggested, within my experience, that she is obliged to get rid of that order before presenting her petition. I must not be taken to be suggesting that even if she did so it would make any difference to the reality of the matter; but, for what it is worth, she would be getting rid of the advantage of being able to plead a subsisting order, and she is not obliged to do so.

I think that the whole of the suggestion that there is a conflict between the two jurisdictions in getting rid, pending suit, of the old order, is a fallacy. The truth and the reality of the matter is that the application is made to ensure that there is no overlapping between the two. That, of course, cannot be said of the class of case in which this court has set its face against an overlap of the jurisdiction where there is an attempt, for example, to raise a charge of adultery in the magistrate's court when the same issue is pending in the High Court, or there is pending in the High Court a proceeding in which that same issue could

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properly be raised. This case does not come within any measurable distance of that principle.

In my opinion the magistrate should have set this order aside on the wife's application, so that the matter might proceed under her petition, and I think that we ought to do the same. In so far as it is a matter of discretion, which I doubt, if the wife herself wishes to have the order set aside, I feel no difficulty about exercising our discretion in the matter, because I think that the reasons the magistrate has given for the exercise of the discretion in the way he exercised it are unsound. In my opinion this appeal must be allowed, and the order set aside.

KARMINSKI J. I agree. I am not able to share the difficulties of the magistrate in this matter, though he gave very careful attention to the arguments before him. But, as my Lord has pointed out, in cases where a wife has obtained an order in a court of summary jurisdiction and then petitions in the High Court for divorce, there is likely to be, at any rate for a time, a certain concurrence of jurisdiction, and in cases of desertion the only way out of this position would be for the wife to apply to the magistrates to discharge her order before she files her petition. That step may be fraught with dangers, not inevitably fatal, for her, because she would be weakening the evidence in her hand that the desertion had continued up to the presentation of the petition. But short of an active conflict on the financial side in a case of this nature I see no difficulty in the matter. Indeed, the magistrate has suggested two alternatives, which seem to me to be more likely to be causes of two concurrent exercises of jurisdiction than the order which was sought from him. He suggested that the wife, though she had a petition pending in the High Court, should apply to the magistrate's court for an increase in the existing order, or alternatively that she should apply to the registrar in the High Court for alimony pending suit, and then ask to have that application adjourned for a time so that she could go back to the magistrate to discharge the existing order. The second alternative, without avoiding the possibility of concurrent jurisdiction, seems to me to be really a more roundabout way of approaching the matter than that which the wife has already undertaken.

So far as the question of principle is concerned here, I entirely agree with my Lord that the matter is of some interest, because the rights of a wife in the High Court are not only

greater, but quite distinct from, those which she can obtain in a court of summary jurisdiction. As my Lord has pointed out, there is no limit to the amount which the High Court can order. It is further of importance to recall that there is power in the High Court to order secured payments for life, in proper cases, whereas no such provision exists in the court of summary jurisdiction.

I would only add that there may or may not be a decree of dissolution in this case. On that I can form no judgment, because I do not even know whether an answer has been filed or not. All I can say is that, with only the petition before me, it appears as a matter of pleading to present a prima facie case; but as Mr. Stogdon has rightly pointed out, the answer is not yet known. However, if (and I emphasize the word "if") a decree of dissolution is granted, it sometimes happens that an investigation on alimony pending suit saves a second investigation on maintenance of what are often the same figures. I agree with my Lord that this appeal must be allowed.

Appeal allowed; order discharged.

Solicitors: *Ludlow, Head & Walter, agents for Willey Hargrave & Co., Leeds; L. Godlove, Leeds.*

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An apprentice in the merchant navy while on leave in war-time executed a testamentary document shortly before rejoining his ship, which sailed a day or so later. The document was executed in compliance with the formalities of the Wills Act, 1837, but as he was then a minor the question arose on his death whether he was at the material time a "seaman being at sea" within the meaning of section 11 of the statute:—

Held, that, since the document was executed in contemplation of a fresh voyage, and the deceased was under orders to rejoin his ship before a certain date, he was "a seaman at sea" when he made his will.

*Followed. In the
Estate of WILSON
[1952] P. 5*

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In the Goods of Lay, decd. (1840) 2 Curt. 375, *In the Goods of Sarah Hale, decd.* [1915] 2 I.R. 362 followed; *Barnard v. Birch* [1919] 2 I.R. 404 distinguished.

A certain bequest in the will was struck out and initialled by the deceased but there was no definite evidence whether this had been done before or after the formal execution:—

Held, that the presumption that in the case of a soldier's will such alterations are presumed to have been made during military service is applicable to wills made by a seaman being at sea, and that since no formalities are required for the revocation of such wills there was a valid revocation of the bequest.

In the Goods of Tweedale (1874) L.R. 3 P. & M. 204; *In the Estate of Gossage, decd.*, *Wood v. Gossage* [1921] P. 194 followed and applied.

CONTESTED PROBATE MOTION.

The following statement of facts is taken from the judgment: The deceased, Ian Frederick Charles Newland, was born on September 30, 1925, and died on August 8, 1951, at the Government General Hospital, Madras, in India. On April 19, 1944, he joined the steamship *Strathmore* as an apprentice, and continued to serve in that vessel until October 24, 1944. The *Strathmore* was engaged as a troopship voyaging between England and India. On July 4, 1944, she was in dock, and there is no doubt, though for security reasons the name of the port was not entered into the ship's log, that the port at which the *Strathmore* was docked was Liverpool.

On July 25, 1944, the deceased was ashore at a friend's house at Walton-on-Thames, Surrey, being then on leave from the *Strathmore*. He rejoined his ship before she sailed again on August 1, 1944, and remained in the service of the company with that ship until October 24, 1944.

On July 25, 1944, while at Walton-on-Thames, he executed a will in the presence of two witnesses, in compliance with the formalities required by the Wills Act, 1837, but at that date he was between eighteen and nineteen years of age and, therefore, unless he was a person who was entitled to make a privileged will under section 11 of the Wills Act, 1837, his will would be invalidated by reason of the fact that he was under the age of 21 years.

[A further point arose on this motion: The applicants, who were the executors of the will, prayed that the grant of probate should omit from the will a certain gift. That bequest was of a sum of money "to each of my five cousins. . . ." The amount of the bequest was struck out so as to be illegible, although it was

possible to see that the symbol “£” had been used; the words “to each of my five cousins” were struck out by a line drawn through them, and the alteration was initialled by the deceased. These facts are referred to at the end of the report.]

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Bayne-Powell for the applicants (the executors). The document in question is a valid will (a) on the principle in *In the Goods of Sarah Hale*¹ that the deceased who had been previously at sea was about to go to sea again; (b) on the principle that the will was made in the course of a voyage, the continuance of which is evidenced by the fact that the deceased was merely on leave from his ship.

Bradburn for those interested in intestacy. Section 11 of the Wills Act, 1837, draws a distinction between a soldier—“in actual military service”—and a mariner or seaman—“at sea.” Section 2 of the Wills (Soldiers & Sailors) Act, 1918, is not applicable because the deceased as an apprentice in the Merchant Navy was not “a member of His Majesty’s naval or marine forces”: see *In re Bickley’s Will*.² The sole question is: Was the deceased “at sea” at the material time?

*In the Goods of Lay*³ is distinguishable, for the deceased was on short shore leave in a foreign port. Here the deceased was on leave between voyages. *In the Goods of Sarah Hale*¹ is also distinguishable on the facts. Moreover it is not a decision binding on the court and was made upon an ex parte application.

Although the court is naturally anxious to admit as a will the expressed intentions of the deceased—see for example *In the Estate of Anderson*⁴—there is evidence in this case before the court that the deceased had expressed different intentions shortly before his death.

Hesketh for the cousins of the deceased.

Cur. adv. vult.

HAVERS J. This case raised an interesting and somewhat difficult question as to the interpretation of certain words in section 11 of the Wills Act, 1837. It so happened that the next case on my list⁵ raised a similar question on somewhat different facts. I thought it right therefore to hear the arguments in the

¹ [1915] 2 I.R. 362.

² (1949) 49 N.S.W.S.R. 94.

³ (1840) 2 Curt. 375.

⁴ [1916] P. 49, 52.

⁵ *In the Goods of Alfred John Wilson, deceased; Wilson v. Coleclough*, post, 92.

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second case before I made up my mind as to my decision in either of the two cases. I should like to say that I am very much indebted to all the counsel concerned in both cases for the help which they have given to the court not only in citing all the relevant authorities, but also for the admirable arguments which they have addressed to me.

[His Lordship stated the facts and after reading sections 7 & 11 of the Wills Act, 1837,⁶ continued:] It will be observed that the language of section 11 differs according to whether it is referring to a soldier or to a mariner or seaman. As regards the soldier, the condition is that he must be in actual military service. As regards a mariner or seaman, the requirement is being at sea.

It was always recognized by the courts that if a person came within the definition of section 11 and was therefore entitled to make a privileged will, he was entitled to do it although he was not of the age of 21 years. That was recognized and approved by section 1 of the Wills (Soldiers and Sailors) Act, 1918,⁷

[His Lordship read the section and continued:] The applicant, therefore, had to satisfy me that at the date when the deceased made his will he was a seaman at sea within the meaning of section 11 of the Wills Act, 1837.

[His Lordship then read section 2 of the Act of 1918.⁸] It is to be observed, however, that that section only applies to any member of His Majesty's naval or marine forces and in my view does not apply to persons who are seamen in the merchant navy.

In considering the true construction of these words "at sea," it will be observed that the words contained in section 11 are "seaman being at sea" not "on the sea." It is clear from the authorities which have been cited to me that the court has put a liberal interpretation on these words. For instance, it seems to

⁶ The Wills Act, 1837, s. 7: "No will made by any person under the age of 21 years shall be valid."

s. 11: "Any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act."

⁷ The Wills (Soldiers and Sailors) Act, 1918, s. 1: "In order to remove doubts as to the construction of the Wills Act, 1837, it is hereby declared and enacted that section eleven of that Act authorizes and always has authorized any soldier

"being in actual military service, or any mariner or seaman being at sea, to dispose of his personal estate as he might have done before the passing of that Act, though under the age of twentyone years."

⁸ The Wills (Soldiers and Sailors) Act, 1918, s. 2: "Section eleven of the Wills Act, 1837, shall extend to any member of His Majesty's naval or marine forces not only when he is at sea but also when he is so circumstanced that if he were a soldier he would be in actual military service within the meaning of that section."

me to be clearly established by authority that a seaman who is ashore on leave at a port during the course of a voyage and, while ashore on such leave, makes a will is a seaman "at sea."

I have examined the various authorities which have been cited to me to see whether I could extract from them some general principle which was of universal application, but I have been unable to find any such principle. Perhaps that is not surprising in view of the variety of circumstances which may arise and, of course, the court, certainly a court of first instance, is not concerned so much to lay down any general principle; its function is to determine the true position on the particular facts of the case with which it has to deal. Accordingly, on examination of the authorities, it appears that at times the court has stressed a particular factor or a number of factors and at other times emphasis has been laid upon a different factor, or series of factors. In one case the fact that the voyage had begun appeared to have been the decisive factor, and the voyage was deemed to have begun although the ship was in the river preparatory to sailing. In another case a mate on board a ship that was stationed permanently in Portsmouth Harbour was held to be a seaman "at sea." In yet another case a man who was attached to a ship but did not go on board that ship or any other ship, but remained ashore when he wrote out the document, was held not to be "at sea." It appears from the judgment that the court might possibly have decided the case the other way if he had been at sea at any period before he wrote out the document. In another case the decision appears to have been based on these facts, namely, that the deceased, though on shore at the time of the writing of the document, was under orders to sail and the documents were written in contemplation of sailing; or, putting it in other words, that the particular person was preparing for a voyage. Consequently one finds, on examining the authorities, that some cases have been held to fall on one side of the line and others on the other side of the line.

I propose to examine the various authorities that were cited to me. The first was *In the Goods of Henry Corby, decd.*⁹ The facts of that case, according to the headnote, were: "A vessel was lying at Melbourne in Australia, when H. C., who had been some time resident there, shipped on board as an able seaman to return to England. The vessel did not sail for some days after. Irregular papers of H. C. dated the very day on which

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⁹ (1854) 1 Spinks 292.

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“he shipped” [were held] “not entitled to probate as a mariner’s will under section 11 of the statute.”

Dr. Lushington who tried that case, observed in the course of the argument¹⁰ “You ask for probate of these papers as a seaman’s will, but have you any evidence that he was on board ship at the time he wrote them?” Dr. Middleton, one of the counsel engaged in the case, said: “The evidence is to the effect that he was shipped, as a mariner, on board this vessel on the day when the papers bear date.” Then Dr. Lushington intervened saying: “It seems to me running it rather close to say that he was a mariner when he made his will only on the very day when he was shipped, and when the vessel was in a British port. It is a very nice question which the court must take time to consider.”

Dr. Lushington subsequently rejected the motion, saying¹⁰: “This case I have taken time to consider, as the question involved appeared to me of considerable importance, and it was my anxious wish to grant the motion for probate of these papers, if I thought I could do so consistently with my apprehension of the law. These papers are not executed according to the requirements of the statute, and the application is for probate of them as privileged under the 11th section. That section, however, only applies to wills made at sea. Now, in the present case, there is no evidence whatever where these papers were written, nor whether the deceased was even on board the ship at the time. It appears that the deceased had not originally sailed to Australia in this vessel, but that he had been residing there for nearly twelve months before he shipped as a mariner to return in her to England, and that he so shipped on the 15th of March.”

Those facts seem to me to be facts of great importance. In that case this particular man Henry Corby had not originally sailed to Australia in that vessel at all; and he had been living in Australia for nearly twelve months before he did ship as a mariner to return in this ship to England.

Dr. Lushington continues¹⁰: “Now the paper marked A, bearing date the 6th of March, I think, must be put out of consideration altogether, as being clearly not entitled to the privilege. But with respect to the other two papers, it is a different question. They both bear date the 15th of March, on which day, it appears in evidence, the deceased shipped on

¹⁰ 1 Spinks 292, 293.

“board this vessel, as a mariner, to return to England. But, assuming that these papers were actually written on board this ship, I am not prepared to say they would be entitled to probate as a mariner’s will, for it must be borne in mind that the statute says ‘mariner or seaman being at sea,’ and it appears that this vessel did not sail till the 30th of March, fifteen days afterwards. Can it then be said that these papers were written at sea, within the true meaning of the statute? I think not. I am aware of the case of *In the Goods of Lay, decd.*,¹¹ but the circumstances of that case appear to me totally distinguished from the present. I must reject the motion.”

In the Goods of Lay, decd.,¹¹ was relied upon very strongly by the applicant. The report is as follows: “The deceased in this case was mate of Her Majesty’s ship *Calliope*, and whilst the vessel was in the harbour of Buenos Ayres, on the 4th November, 1839, obtained leave to go on shore, where he met with a severe fall, and was thereby so severely injured that he died on shore on the 9th. Immediately after the accident, he wrote on a watch-bill, in pencil, his will, which was cut out and certified by the officers on board the ship on the 5th; but it was unattested. The paper had been rejected by the receiver of seamen’s wills, in regard to prize money. . . . The court, distinguishing this case from that of *Lord Hugh Seymour*,¹² who was living on shore at Jamaica, only occasionally going on board his ship, held that this case came within the exception of the Act; that it was the will of a seaman at sea, although the deceased, having had leave to go on shore, was not actually on board ship at the time the will was made.”

The case of *Lord Hugh Seymour*¹² was referred to in *In the Goods of Richard Hayes, decd.*¹³ The report states that Lord Hugh Seymour, who was the admiral of the station of Jamaica, made a nuncupative codicil which was rejected by the court on the ground of its having been made at the Admiral’s house on shore, and it was held that he was therefore not at sea as required by the statute. The distinction was apparently that the admiral had a permanent residence on the shore and only occasionally went on board his ship.

Mr. Bradburn sought to distinguish *In the Goods of Lay, decd.*,¹⁴ upon these grounds. He urged that the *Calliope* was in the middle of a voyage and that the testator, if I may use that

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¹¹ 2 Curt. 375.¹³ (1839) 2 Curt. 338.¹² (1802) cited 2 Curt. 339.¹⁴ 2 Curt. 375.

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description to describe the person who made the document, was only ashore during a short period of leave in the course of the voyage, whereas the testator in the present case was in England at the time he executed his will, that he had no fixed address, and that in a sense it might be said that when he executed that will at the address in Surrey he was at home, and further that this will was not made during the course of a voyage but in between voyages.

The next case to which I was referred was the case of *In the Goods of Adam Patterson, decd.*¹⁵ The headnote reads: "A letter containing testamentary dispositions written on a ship lying within a river, and before the ship has actually sailed, may be a valid will as made by a seaman at sea." In the course of the argument Barnes J. said: "The will here was made in the river. Is there express authority covering these facts?" and he was told "No express authority, but there are analogous cases." Barnes J. then asked: "What is the evidence as to where he was at the time of writing this letter," and it was pointed out "The heading of the letter shows that." Barnes J. then said "I think I can assume that he was on board and waiting to start." He was referred to *In the Goods of Lay, decd.*,¹⁴ and *In the Goods of Richard Hayes, decd.*,¹³ and said that the first of those cases seemed to have been approved by Lord Penzance in *In the Goods of M'Murdo*.¹⁶ Barnes J. then said: "I think you may take the grant. The deceased had gone on board, and the voyage had begun for the purpose of making this document the will of a seaman at sea."

The facts of *In the Goods of Adam Patterson, decd.*,¹⁵ are not very analogous to the facts of the case with which I have to deal, but there the deceased had gone on board and it was held that the voyage had begun for the purpose of constituting the document the will of a seaman at sea although in fact the ship was actually lying in the river preparatory to sailing.

The next case cited was *In the Goods of M'Murdo*.¹⁶ This case was, I think, relied on by both sides. The headnote reads: "A will made by a mariner serving on board H.M.S. *Excellent*, whilst she was permanently stationed in Portsmouth harbour, was held to be the will of 'a mariner or seaman being at sea' and within the 11th section of 1 Vict. c. 26." In the statement of facts it is said that the deceased was a mate in Her Majesty's

¹³ (1899) 2 Curt. 338.¹⁴ 2 Curt. 375.¹⁵ (1898) 79 L.T. 123.¹⁶ (1867) L.R. 1 P. & M. 540.

service serving on board the *Excellent*, which was a gunnery ship permanently stationed in Portsmouth harbour. Sir James Wilde in giving judgment said¹⁷: "I think this application must be refused." The application in that case was for the revocation of the grant of probate on the ground that the deceased was not a mariner or seaman at sea. "The admitted facts are that the deceased was a mariner in Her Majesty's service, that at the time when the will was made he was a mate on board the *Excellent* and that the will was executed on board the *Excellent*, that vessel being at the time laid up in Portsmouth harbour, and there being no immediate intention of sending her to sea. A will made under these circumstances, in my opinion, comes within the description of the will of a mariner or seaman being at sea. I see a great distinction between this case and that of *In the Goods of Corby*,¹⁸ where the deceased wrote a letter of which probate was sought, stating that he had shipped on board a vessel lying in Melbourne harbour on the date of the letter. It did not appear whether the letter was written before or after he went on board, and the expressions which he used may have meant nothing more than that he had signed ship's articles, and had bound himself to join the vessel on a certain date. If he used the expressions with that meaning, he could not be said even to have joined the vessel in the sense of having commenced his maritime service."

A passage then follows on which both sides relied: "The cases appear to me to go this length, that where a man has joined a vessel on service, and has commenced a voyage in it, a will made in the course of that voyage will be within the exception in the Act, even although such will was in fact made on shore." If that was the sole and exclusive test to be applied to the facts of every case, I should find very much greater difficulty in deciding this case than I do; but in my view that case did not purport to lay down a criterion for every kind of case, but was merely laying down a principle which was applicable to the facts of that particular case.

Sir James Wilde continues: "That was the case in *In the Goods of Lay*.¹⁹ The *Calliope* was lying in the harbour of Buenos Aires, but whether she had gone there to refit, or for provisions, or for some other temporary purpose, or whether she was stationed there, does not appear. But she was actually

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¹⁷ L.R. 1 P. & M. 540, 541.¹⁹ 2 Curt. 375.¹⁸ 1 Spinks 292.

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“in the harbour at the time of the making of the will, and the will was in fact made on shore. In the case of *Austen* ²⁰ the will was made whilst the admiral was engaged on an expedition up a river, when although he was not actually at sea, he was practically on maritime service, which he had commenced by going to sea. It seems to me impossible to draw a distinction for this purpose between the *Calliope* lying in Buenos Aires harbour and the *Excellent* lying in Portsmouth harbour. Although a seaman on board the *Excellent* is not in a foreign country, still he is subject to the restraints of the service, and might have no opportunity of making a will with the usual formalities if he was taken ill on board when no lawyer was at hand.” It is important, however, to observe that there Sir James Wilde was citing with approval *In the Goods of Lay, decd.*¹⁹

In contrast to that *In the Estate of William Edward Anderson; Anderson v. Downes*,²¹ was cited to me. The headnote reads: “A member of a local corps of the St. John’s Ambulance Association, being about to start from home under orders to join H.M.S. *Pembroke*, permanently stationed at Chatham, wrote out at home on the morning of his departure a document disposing of his property. He remained in barracks at Chatham and did not go on board ship till he joined a transport on August 17, 1914, and he was wrecked in her on October 30, 1914. *Held*, not within the exceptions in section 11 of the Wills Act.” Bargrave Deane J. in giving his judgment said,²² after referring to the facts and in particular to the fact that after he had gone to Chatham and was attached to H.M.S. *Pembroke* he did not go on board that or any other ship until he joined the *Rohilla* on August 17, 1914: “This would be a perfectly good will if made when this man was at sea. The language of section 11 of the Wills Act (1 Vict. c. 26) is peculiar: the words are not identical with regard to soldiers and mariners. To come within the exceptions in that section, a soldier must be in actual military service, and if this deceased man had been a soldier, or if those words had applied to sailors or mariners, it might have been argued successfully that he came within the exceptions. But when the deceased wrote out this document he was not at sea: he was in fact at home in his father’s house. It is with the greatest regret that I feel compelled to hold that this document

¹⁹ 2 Curt. 375.

²⁰ (1853) 2 Rob.Ecc. 611.

²¹ [1916] P. 49.

²² *Ibid.* 51.

“cannot be admitted as a will. Various cases have been cited, “and the nearest in point seems to me to be *In the Goods of Lay*,¹⁹ where the court, in admitting the document, held that “it was the will of a seaman at sea, although the deceased, “having had leave to go on shore, was not actually on board “ship at the time he wrote the document. This was referred to “with approval by Sir J. P. Wilde in the case of *In the Goods of M'Murdo*.”²³

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This passage, which seems to me to be of some importance, then follows: “If the deceased in the present case had been at “sea at any period before he wrote out the document now before “me, it might have been argued, with some chance of success, “that he was within the words of section 11.”

In *In the Estate of Ada Stanley*²⁴ the headnote is: “A nurse, “employed under contract by the War Office on hospital ships, “wrote a letter giving the addressee full liberty to deal with her “affairs and giving directions as to the disposal of her property. “The letter was written during an interval of leave on shore “in this country, but after the writer had received orders to “re-embark. *Held*, that the letter, which was unattested, was “privileged as a soldier’s will within the meaning of the Wills “Act, 1837, s. 11, and that the person to whom it was addressed “was executor according to tenor, and, as such, entitled to “probate of the document.”

In his judgment Bargrave Deane J. said²⁵: “I think that a “nurse is entitled to make a privileged will upon the same footing “as a soldier or a sailor, following the principle of the Irish case “cited” (*In the Goods of Sarah Hale*²⁶). “Probate will go of “the letter as constituting a soldier’s will, the contract of the “deceased having been with the War Office, and the grant will “be made to the applicant as executrix according to tenor.”

It is to be observed that there had been some dispute whether a woman could properly be included in the description either of a soldier or sailor or a mariner or seaman. That had been argued and decided in *In the Goods of Sarah Hale*,²⁶ and I think that when Bargrave Deane J. was saying that he thought a nurse was entitled to make a privileged will upon the same footing as a soldier or a sailor he was merely saying that a nurse employed as this lady was under contract with the War Office on hospital ships

¹⁹ 2 Curt. 375.

²⁵ Ibid. 194.

²³ L.R. 1 P. & M. 540.

²⁶ [1915] 2 I.R. 362.

²⁴ [1916] P. 192.

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could properly fall within the description of a soldier following the principle of *In the Goods of Sarah Hale*.²⁶

In the Goods of Sarah Hale ²⁶ was very strongly relied upon on behalf of the applicant. The headnote is as follows: "The deceased, who had been for several years in the employment of a steamship company as a typist, was in the habit of travelling as a typist on the vessels of the company (large ocean liners), sailing between Liverpool and New York. She spent the periods between voyages working in the company's offices in Liverpool. Her testamentary dispositions were contained in three letters. None of these documents was signed or attested as required by the Wills Act (1 Vict. c. 26), but all, though written from the deceased's lodgings in Liverpool, were written in contemplation of sailing. The deceased was afterwards lost in the sinking of one of the ships of the company. *Held*, that every person employed in any branch of the Royal Navy or Merchant Service, from the highest to the lowest, is included, when at sea, in the exceptions contained in section 11 of the Wills Act (1 Vict. c. 26); that consequently the deceased came within the meaning of the term 'mariner or seaman'; and that this term is not confined to the male sex. *Held*, also, that the deceased was 'at sea' within the meaning of the section, at the time of making her will."

Madden J. who delivered judgment said ²⁷: "The deceased Miss Hale had been for several years in the employment of the Cunard Steamship Company as a typist, and was in the habit of travelling as a typist on the vessels of the company sailing between Liverpool and New York. A continuous certificate of discharge covering the period from the 25th May, 1909, to the 6th March, 1915, is in evidence. She had in her possession at the time of her death, on the 7th May, 1915, the continuous certificate of discharge which covered the period from March, 1915, onward, but this document is, of course, not forthcoming.

"The documents of the 14th January, 1915, were found after the death of the deceased in a case at Mildmay House, Liverpool, where she had told her sister, the wife of the applicant, that she would find instructions, in the event of anything happening to her. The letter dated 'St. Patrick's Day' was delivered in course of post.

"The documents of the 14th January were written in contemplation of the sailing of the *Lusitania* from Liverpool. Miss

²⁶ [1915] 2 I.R. 362.

²⁷ Ibid. 368.

"Hale was in the service of the company at the time of the writing of those documents. She did not sign on for the voyage until the 16th January. But it is evident from the letter of the 14th that she was under orders to sail on that date."

Those seem to me to be the decisive facts on which Madden J. founded his judgment. He goes on to consider whether or not in this particular case the lady was a "seaman," and, after he had decided that point, considered the question whether she was a "seaman at sea." He says²⁸: "Then comes the question: 'Was the testatrix at sea on the 14th January, 1915? And here I derive assistance from the judgment, from which I have already quoted, of Sir F. H. Jeune in *In the Goods of Hiscock*."²⁹ It was there decided that a private in a volunteer battalion who had sent in his name for active service in the South African War, who had been certified as fit by the medical inspector, and who had gone into barracks with a view to being drafted for active service, and had there made his will, was at that time "a soldier in actual military service." The judge applied this test to the case of the soldier: 'Had he taken some step at the time when he made his will to bring himself within the words of the section? This brings us very close, if, indeed, not actually, to the same point as what the Romans meant by in expeditione, for when a Roman soldier did anything towards fighting the enemy, he would have been considered, under the law of his time, as being in expeditione.' This case was followed and applied by Boyd J. in the case of *In the Goods of Godley*.³⁰ There is less difficulty in applying a similar test to the case of a seaman preparing for a voyage, for the words "in actual military service" are more definite and specific than the phrase "being at sea." In my opinion Miss Hale was "at sea" at the time of making her will, in a more real sense than Hiscock was "in actual military service" under the circumstances of the case stated in the judgment from which I have quoted of Sir F. H. Jeune."

I do not myself derive the assistance which Madden J. derived from a comparison of this case with *In the Goods of Hiscock*.²⁹ As I have already pointed out, the language of the section when it deals with soldiers is entirely different from the language of the section dealing with mariners or seamen at sea. It has also been pointed out now by the Court of Appeal that in the

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²⁸ [1915] 2 I.R. 362, 370.

³⁰ (1907) 41 Ir.L.T.R. 160.

²⁹ [1901] P. 78.

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interpretation of the words relating to soldiers the position of the soldier in actual military service is not identical, as was at one time thought, with that of the Roman legionary who was in expeditione. It seems to me that the material facts on which the judge relied were the facts which I have already indicated, that the documents were written in contemplation of the sailing on the *Lusitania*, that the lady at the time was in the service of the company, and that she was under orders to sail on that date.

Mr. Bradburn pointed out to me that this Irish case is not a binding authority on me, although it is entitled to great respect. He also pointed out that it was an *ex parte* case, and that there was no argument on the other side; and he sought to distinguish it upon the grounds that in *In the Goods of Sarah Hale*³¹ each will and codicil was made two days before sailing and that the lady typist had been informed that she was about to sign on for the particular voyage. He argued that there was a closer link between the will and codicil and the respective events in *In the Goods of Sarah Hale*³¹ than there was in the present case of *In the Goods of Newland*. He also argued that in *In the Goods of Sarah Hale*³¹ the documents were made with a particular voyage in mind, whereas he contended before me that in the present case the voyage from India had actually finished and there was no evidence that the new voyage had begun.

There was one other Irish case cited to me in which the decision went the other way, that of *Barnard v. Birch*.³² The headnote to that case is: "The deceased was a captain in the "mail service, and commanded the S.S. *Leinster* during its cross-channel voyages between Holyhead and Kingstown. He was "actually at sea for the time each day spent in transit. He was "on shore for the remainder of each day. He had a house at "Holyhead where he and his wife and family lived. His testamentary disposition was contained in a document purporting to "be a will which he signed at his house at Holyhead between "voyages. The deceased was drowned when the *Leinster* was "sunk. *Held*, that the deceased was 'a seaman,' but was not "'a seaman being at sea' within the meaning of section 11 of "the Wills Act (1 Vict. c. 26) when he signed the said document "purporting to be his will."

Dodd J., who decided that case, said³³: "It is said there are "judicial decisions that control my judgment. Madden J. has

³¹ [1915] 2 I.R. 362.³³ Ibid. 408.³² [1919] 2 I.R. 404.

“given a considered judgment in *In the Goods of Sarah Hale*.³¹
 “The deceased in that case was a lady typist in the employment
 “of the Cunard Steamship Company as a typist on the vessels
 “of the company sailing between Liverpool and New York. She
 “wrote some letters which were testamentary just as she was
 “starting. The learned judge in a luminous judgment decided
 “she was a seaman, and a seaman preparing for a voyage, and
 “that she was a seaman being at sea. Bargrave Deane J., in
 “*Anderson’s Estate*,³⁴ decided that a man who was called up on
 “the Naval Reserve, but had not actually been made a sailor,
 “was not a seaman being at sea. The two cases are said to be
 “in conflict. I do not think they are, in principle. Indeed, in
 “a subsequent case, *Ada Stanley*,³⁵ Bargrave Deane J. adopts
 “the principle of Madden J.’s decision. The lady there was a
 “nurse under the Queen Alexandra Imperial Nursing Service.
 “The letter was written during an interval of leave on shore in
 “this country, but after the writer had received orders to re-
 “embark. The judge, applying the principle of Madden J.’s
 “judgment, held that she was a seaman being at sea.”

Dodd J. was, in my view, under a complete misapprehension there, as Bargrave Deane J. did not hold that the lady was a seaman at sea. What he held was that, just as in *In the Goods of Sarah Hale*,³¹ the lady typist could be a seaman, so in the case of a nurse employed as she then was the nurse could be a soldier. The decision was not upon the footing that she was a seaman at sea, but that she was a soldier.

Dodd J. continues³⁶: “When this case was opened Mr. Hanna, for the defendant, admitted that if the judgment of Madden J. in *In the Goods of Sarah Hale*³¹ was good law, and that I was bound to follow it, he could not contend that the deceased was not a seaman at sea. In that case the deceased lady wrote out the documents some days before she sailed, in her own lodgings in Liverpool, where she stayed between voyages. She was a typist, in the habit of travelling as a typist for the company between Liverpool and New York. She went down in the ‘*Lusitania*.’ Madden J. held she was ‘a seaman, being at sea when she wrote the documents.’ Mr. Hanna said I was not bound to follow that decision, as there was a decision to the contrary in the English courts, decided by Bargrave Deane J.: *In the Estate of William Anderson*.³⁴

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³¹ [1915] 2 I.R. 262.³⁵ [1916] P. 192.³⁴ [1916] P. 49.³⁶ [1919] 2 I.R. 404, 410.

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“ The decision of Madden J. was, he said, an ex parte decision, and the case before Bargrave Deane J. was fully argued. I am of opinion that I am not called upon to decide what my duty would be under the supposed conflict of authority, for there is no conflict. There is a sentence in the English report: ‘ The language of section 11 of the Wills Act (1 Vict. c. 11) is peculiar. The words are not identical with regard to soldiers and mariners. To come within the exceptions in that section, a soldier must be in actual military service; and if this man had been a soldier, or if those words had applied to sailors or mariners, it might have been argued successfully that he came within the exceptions. But when the deceased wrote out this document he was not at sea; he was, in fact, at home in his father’s house.’ ‘ The deceased was not a soldier, and he was not a seaman at sea.’ The learned judge makes it clear: ‘ This would be a perfectly good will if made when this man was at sea.’ . . . ‘ If the deceased had been at sea at any period before he wrote out the document before me, it might have been argued that he was within the words of section 11.’

“ Madden J.’s reasoning is alleged to be at variance with this. He traces the words ‘ in actual military service ’ back to the Roman phrase ‘ in expeditione,’ and cites *In the Goods of Hiscock*,³⁷ which applied this test to a soldier: ‘ Had he taken some step at the time when he made his will to bring himself within the words of the section?’ ”

The judgment continues: “ The argument of Mr. Hanna is based upon the assumption that Madden J. has decided that preparing to go to sea is equivalent to being at sea, and that Bargrave Deane J. decided that preparing to go to sea was not equivalent to being at sea. Neither judge so decided. On the facts before him Madden J. decided that preparing to go to sea was equivalent to going to sea, and Bargrave Deane J. decided that, upon the facts before him, the man was not a seaman. I suppose there is involved this discrepancy. Bargrave Deane J. seems to say that a man called up to be a seaman was not a seaman at sea. In the English case the man had been merely called up. In the Irish case the lady was in the actual service of the company, and was resuming her occupation as a seaman. Bargrave Deane J. expressly, as I have shown, differentiated the two cases. This is not a matter

³⁷ [1901] P. 78.

“left in any doubt. Madden J.’s judgment was not cited in the argument before Bargrave Deane J. It was not applicable. But in a subsequent case, in the same volume of the reports, *In the Estate of Ada Stanley*,³⁸ it was cited before Bargrave Deane J. himself, and the principle of it approved of and followed. The letter in that case was written during an interval of leave on shore in this country, but after the writer had received orders to re-embark. The lady there was a nurse under the Queen Alexandra Imperial Nursing Service, and was on leave pending further orders.”

The conclusion of the judgment³⁹ is in these terms: “The facts in this case clearly bring it within the principles laid down by Madden J., namely—(1) That the section of the Wills Act is not confined to actual seamen. (2) That the section extends to women. (3) That a person who is not actually at sea may be a seaman.

“I adopt these three principles, and apply them to the facts of the present case. It is not essential that he or she should be actually on the sea; but the contrary principle is not affirmed. It does not necessarily follow that a seaman who is looking forward to a voyage is a ‘seaman being at sea.’

“Captain Birch was a seaman who had daily duties to perform. For six or seven hours a day he was on the sea; the rest of the day he was on shore. When his boat was laid up he remained on shore in his own house with his wife and family. He had been so living for some weeks, and his time for resuming his daily sailings was approaching when he made this will. Was he within the principle of a seaman preparing for a voyage? When the captain reached his home, was he a seaman being at sea or was he a seaman being on shore?” [The judge then stated the facts set out.] “On these facts, was Captain Birch ‘a seaman being at sea’ within the principles of the authorities I have referred to? If he had made the will when he went ashore on November 17, would he then have been a seaman being at sea? Apply the other tests. ‘Had he taken a step?’ Was he preparing for a voyage? If not on the 17th, when, then, did the principle begin to operate? Is there anything to show that the captain was doing anything really preparatory to a voyage?

“Applying the legal principles which I accept to the facts of this case, I am of opinion that when Captain Birch was sitting

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³⁸ [1916] P. 192.³⁹ [1919] 2 I.R. 404, 413.

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“ in his own house on the day he made the will he was a seaman
 “ on shore, and not a seaman being at sea.”

That case, I think, is very different from the others, because there it could be really said of that particular captain that on every day he was for so many hours of the day at sea and for the rest of the day he was on shore at home. It was also the fact that that ship had been laid up for a very considerable period before another voyage was contemplated and it was during that period when the testamentary document was made.

My attention was also called to a decision of the Court of Appeal in *In re Wingham, deceased*.⁴⁰ That case really lays down the true test for the interpretation of the words “ in actual “ military service ” as applied to soldiers, sailors, or airmen in the service of the Crown. It is not really of relevance to the matter which I have to decide.

I may, however, refer to a short passage in the judgment of Denning L.J., in which he says⁴¹: “ Doubtful cases may arise “ in peacetime when a soldier is in, or is about to be sent to, a “ disturbed area or an isolated post, where he may be involved “ in military operations. As to these cases, all I say is that, in “ case of doubt, the serving soldier should be given the benefit “ of the privilege.” It seems to me that that passage is equally applicable to the case of a merchant seaman who was continually employed during the war in a ship engaged as a troopship between England and India.

Mr. Bayne-Powell argued before me that whether I approach this matter from the angle of *In the Goods of Lay*,⁴² or whether I approach it from the angle of *In the Goods of Sarah Hale*,⁴³ I ought to decide this case in favour of the applicant. He pointed out that the deceased was throughout in continuous maritime service on this ship. He joined this vessel when it was engaged in this service and he had commenced and carried out completed voyages in it, that he was an apprentice bound to serve where ordered, and that the ship throughout the whole of the relevant period was engaged as a troopship on a series of voyages between England and India. If, for instance, while the ship was in dock at some port in India at the end of the voyage from England the deceased had been given temporary shore leave for a day or two, and whilst he was on such leave in India he had made this document, I think that there would be great force

⁴⁰ [1949] P. 187.⁴¹ Ibid. 196.⁴² 2 Curt. 375.⁴³ [1915] 2 I.R. 362.

in the argument that, following the decision in *In the Goods of Lay*,⁴² that document would have been made by him while he was a seaman at sea.†

I cannot myself see any distinction in principle between the instance which I have just given and a case where the deceased is temporarily on leave ashore in England while the ship is in dock in England for the necessary period of time for refitting, and I see no reason why I should not similarly hold that he was during that period a seaman “at sea.” If one approaches the matter in the light of *In the Goods of Sarah Hale*,⁴³ the deceased was in the service of this shipping company at the time this document was written. I also find that the document was written in contemplation of sailing upon the *Strathmore* upon a fresh voyage within a very few days.

I draw that inference from these facts: the document was dated July 25, 1944; the ship sailed on August 1, 1944; the deceased was on leave on July 25, 1944; that leave must have expired at some date probably a day or two before August 1, 1944. This was during the war, and owing to security reasons it is not likely that he would have been told the actual date of sailing; but it seems to me certain that he must have been told to report back at his ship some day or two before August 1. I think that it is a fair inference that I should draw that either at the time when he went on leave or whilst he was on leave that he received instructions to rejoin his ship before August 1. I am satisfied, therefore, that when he wrote this document it was written in contemplation of sailing upon a fresh voyage. Approaching the matter from the angle upon which *In the Goods of Sarah Hale* ⁴³ was determined, I think that I am justified in holding that he was at the time a seaman “at sea.”

Bearing all these cases in mind, and in the light of the particular facts before me, I have come to the conclusion that I should not be putting any excessive strain upon the English language if I were to hold that in the circumstances of this case the deceased was “a seaman at sea” when he made this will on July 25, 1944, and I so hold.

There was a second question to be determined, because at some time or other there was a bequest in this will which was struck out and initialled by Mr. Newland. The bequest read: “Also” (something which to my eye is indecipherable except the symbol £ for pound was there but the amount is not

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⁴² 2 Curt. 375.

⁴³ [1915] 2 I.R. 362.

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decipherable to me) "to each of my 5 cousins of the Dowell family, Claude, Roy, William, Dennis, Brian."

Mr. Hesketh appeared for the five cousins of the Dowell family, but on learning that this will was at the bank from the time it was made until the date of the death he did not feel able to persist in the argument which otherwise he would have addressed to me on behalf of the five cousins of the Dowell family. If this bequest was struck out before the will was executed, then, of course, *cadit questio*. The alternative is that the alteration was made after the will was executed.

The evidence on this question is contained in an affidavit of Mrs. Mabel Teresa Gomes, one of the persons who witnessed the will. She says: "I am unable to say with certainty whether the words 'also' (then there is the blank for the indecipherable figure) 'to each of my 5 cousins of the Dowell family Claude, Roy, William, Dennis, Brian' were deleted before the said will was executed but to the best of my recollection they were so deleted." If she is right that they were so deleted, then there is no question, of course, that that bequest did not form part of the will. The alternative is that the alteration was made after the will was executed.

On that issue I was referred to *In the Goods of Tweedale*.⁴⁴ It is sufficient for me to read the headnote: "Where a will in the testator's handwriting contains material alterations, about the making of which no information can be obtained, and such will was signed by the testator whilst as a soldier he was employed in actual military service, the alterations will be presumed to have been made during the continuance of such military service, and will be included in the probate." I think the same principle must apply to a "seaman at sea," and the presumption, therefore, is that the alteration would have been made while the seaman was "at sea."

It was argued before me by Mr. Bayne-Powell that in a case of a will which does not require any formality as to its making and execution, it could be equally well revoked without any formality. His authority for that was *In the Estate of Gossage, decd.*; *Wood v. Gossage*.⁴⁵ It is enough for me to read the headnote: "Under the Wills Act, 1837, no formalities are required for the execution of a soldier's will and therefore none are required for its revocation. . . ."

⁴⁴ (1874) L.R. 3 P. & M. 204.

⁴⁵ [1921] P. 194.

Upon that principle, therefore, I hold that, if this alteration was made after the will was executed, it was a valid revocation of the previous bequest.

Mr. Bayne-Powell had one further point. Assuming he was wrong about that, he contended before me that the words or effect of this bequest in the will before the alteration are not apparent. In this connexion he called my attention to the decision in *In re the Goods of Itter, decd.; Dedman and Others v. Godfrey and Another*.⁴⁶ The headnote to that case is: "Writing on a document is 'apparent' within the meaning of section 21 of the Wills Act, 1837, when it can be read by looking at the document itself, however elaborate may be the devices used to assist the eye, and however skilled the eye which is being used. Where it can only be read by the creation of a new document, for example, a special photograph, it is discoverable but not 'apparent.'"

For my part I can plainly see something here which looks like the symbol for the pound and I am not able myself to see what were the figures. Mr. Hesketh thought he could see some figures, but I have not had any expert evidence of any kind before me about this, and I am therefore not in a position to say whether a skilled eye might be able to see more than I can see or whether some modern scientific device would enable that to be seen whilst still keeping within the effect of the decision in *In re the Goods of Itter, decd.*⁴⁶ I prefer, therefore, not to base my decision on that ground.

In those circumstances I grant the application which is made to me. There will, therefore, be a grant of probate to Mr. Dodd and Mr. Makin, as executors of the will, omitting from the will the gift to the five cousins.

Application granted.

Solicitors: *Russell-Cooke & Co.; Crawley & De Reya.*

J. B. G.

⁴⁶ [1950] P. 130.

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WILSON v. COLECLOUGH.

Probate—Will—Nuncupative will—Merchant navy—Chief officer—Oral declaration while under orders to join ship in peace time—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 11—Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58), ss. 1 and 2.

The deceased, an officer in the merchant navy, made a declaration in the presence of witnesses that if anything happened to him he wanted everything to go to his mother. The deceased, who intended those words to have testamentary effect, was then under orders to join another ship:—

Held, that the declaration was a nuncupative will, made in contemplation of sailing in a particular ship which he had been ordered to join on a specific voyage for which he was then preparing. Accordingly he was a “seaman at sea” when he made his will.

In the Goods of Newland, decd., ante, 71, and In the Goods of Sarah Hale, decd. [1915] 2 I.R. 362 followed.

PROBATE ACTION.

The deceased, Alfred John Wilson, was at all material times a chief officer employed by the Anglo-Saxon Petroleum Company Ltd. in their marine department. He married the defendant in 1931, and appointed her his sole executrix and beneficiary by a will dated July 9, 1940. In 1941 he obtained a divorce, and it was stated that the defendant, who took no part in those proceedings, had subsequently remarried.

On January 10, 1946, the deceased arrived in London after a voyage from Suez, and went on furlough the following day, remaining on furlough in England until April 16, 1946. He was then awaiting appointment to another ship. On April 25, 1946, he received instructions from the company to proceed to Sunderland to join a ship on April 30. On April 27, 1946, while at his sister's house, he made a nuncupative will by saying in the presence of his mother and others: “If anything happens to me, “I want everything to go to my mother.” The court accepted evidence that such words were spoken, and that the deceased intended them to have a testamentary effect.

On April 30, 1946, the deceased went to Sunderland and joined his ship; and he proceeded to sea without delay, sailing to the Far East. He died in October, 1947, while serving in another vessel.

The plaintiff, the mother of the deceased, prayed for a grant of letters of administration with the contents of the nuncupative will annexed.

Hesketh for the plaintiff.

The defendant did not appear and was not represented.

Cur. adv. vult.

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HAVERS J. stated the facts and said that the same question arose in the present case as in *In the Goods of Newland, decd.*¹ (in which his Lordship had just delivered judgment). His Lordship continued: The plaintiff has to satisfy me that the deceased was a seaman "at sea" at the time that he made this nuncupative will. It is unnecessary for me to review the authorities again which I have reviewed in the previous case. The decisive and material facts in this case are that at all material times Mr. Wilson was a chief officer in the Anglo-Saxon Petroleum Company's fleet of merchant ships, that before the furlough he had been at sea in one of the company's ships, that at the end of the furlough he was awaiting reappointment to another of his company's ships, and that at the time he made this nuncupative will he had been ordered to join a ship for a specific voyage. I find that he made this nuncupative will in contemplation of sailing in that ship on that particular voyage, and I find that he was preparing for the voyage.

In those circumstances, following the decision of *In the Goods of Sarah Hale*,² I am entitled to hold, and do hold, that he was a seaman "at sea."

There will therefore be a grant of letters of administration to the plaintiff of the estate of the deceased with the contents of the nuncupative will annexed.

Grant accordingly.

Solicitors: *Bell, Brodrick & Gray, for Williamson, Stephenson & Hepton, Hull.*

J. B. G.

¹ Ante, 71.

² [1915] 2 I.R. 362.

GORST v. GORST.

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Oct. 11,
12, 25.

Karminski J.

Husband and wife — Connivance — Reluctant consent — Subsequent adultery after consent withdrawn — Possible relief in respect of that adultery.

Connivance may be found although the consent of the complaining spouse is given with reluctance, for if there is consent, the ultimate object behind it, whether it be to bring the other spouse to reason and preserve the marriage, or (at the other end of the moral scale) to obtain damages against a co-respondent, is of small, if any, importance. "Corrupt" connivance is connivance with an epithet, and consent, like intention, is better understood without one.

Lloyd v. Lloyd and Leggeri [1938] P. 174 followed.

Where, however, there has been connivance at adultery and the consent of the complaining spouse is later withdrawn, the court must investigate all the circumstances, including the lapse of time between the adulteries, and it is not precluded from deciding that the connivance has spent its force.

Dicta in Gipps v. Gipps and Hume (1863) 11 H.L.C. 1, 13 not followed.

A husband who experienced serious difficulties in his marital relations suggested to his wife that if he were sexually successful with another woman his inhibitions would probably be cured. This suggestion was wholly repulsive to the wife, and at first she vehemently opposed it. But the husband persisted in his suggestion, and the wife, who was anxious to preserve the marriage and became alarmed at the prospect of a breakdown in her husband's health, eventually gave way, though with reluctance, and told him that if it would cure his difficulties he had better try sexual relations with another woman. She doubted the success of any such attempts. The husband suggested that he should make his attempt with the woman named, who was known to the wife, but the wife told him that his suggestion was abhorrent; he later informed her that he had found another woman but declined to give her name.

The husband informed the wife a few months later that he had given up this woman, and the wife condoned his admitted adultery in the erroneous belief that it had ceased. He subsequently confessed that it had continued, and eventually told the wife that his mistress had throughout been the woman named, and that he desired to marry her. No question of condonation arose in respect of the later adultery.

Held, (1) that notwithstanding the reluctance of the wife her original consent amounted to connivance.

Woodbury v. Woodbury [1949] P. 154, distinguished on the facts.

(2) That the wife's connivance had spent itself, for she had withdrawn her consent to the adultery and forgiven the past adultery; and she was accordingly entitled to a decree.

*There's one
born every
minute!!*

UNDEFENDED PETITION for divorce.

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The parties were married in London in November, 1945. The marriage was one of affection, and both spouses were people of education and intelligence. The wife was a qualified medical practitioner, and the husband, who was at the time of the marriage a serving army officer, now held an academic post. Difficulties occurred at the outset through the husband's inability to consummate the marriage. The husband was a highly strung and possibly a neurotic man, and his sexual failure pressed heavily on him. In May, 1947, he began to display symptoms of violence and had to go for a month to a mental hospital for observation. On his leaving hospital the husband's health seemed little improved, and the wife left him for her own protection.

On July 28, 1947, she presented a petition praying for a decree of nullity on the ground of the husband's incapacity. But the parties were reconciled, the husband made a new attempt to consummate the marriage, and succeeded; and on September 18, 1947, the petition for nullity was by consent dismissed. Thereafter the parties had regular if somewhat infrequent and difficult sexual intercourse, and in or about October, 1948, the wife became pregnant. The only child of the marriage was born in June, 1949.

In February, 1949, the parties had gone to live with some friends, a Mr. and Mrs. Piper, because their own flat was not suitable for a child. Mr. and Mrs. Piper employed in their own household as a mother's help or nurse Miss Patricia Nichol, who was the woman named in the present petition. The husband and Miss Nichol became friends, but there was nothing in their conduct before October, 1949, which aroused or should have aroused the wife's suspicions.

In August, 1949, attempts were made by the husband to renew sexual intercourse with the wife, sexual relations having ceased during her pregnancy. These renewed efforts for the most part failed; in the next two months only two succeeded. Since the birth of the child the husband had lost what little physical desire he had ever had for the wife and now no longer wanted it.

In October, 1949, the husband suggested to the wife that if he was sexually successful with another woman, his inhibitions with regard to the wife would probably be cured. He added that he was still fond of her, and that his inhibitions were purely physical. This suggestion was wholly repulsive to the wife, and

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she clearly, and indeed vehemently, opposed it. But the husband persisted in this suggestion over a period, though for a time the petitioner refused even to consider it; but towards the end of the year she became alarmed at the prospect of another breakdown in the husband's mental health. Her apprehensions were genuine, and having regard to his earlier history could not be said to have been ill-founded. As a medical practitioner the wife was in a position to judge the possible dangers to the husband's health.

At some date in October, 1949, the wife told the husband that she supposed he had better try sexual relations with another woman if he felt that that would cure his difficulties. She thought he would try, but she doubted the success of any attempts with another woman. In her own words, she hoped "that the whole thing would blow over." This consent, if consent it was, was most reluctantly and grudgingly given. The husband then suggested that he should make his attempt with Miss Nichol, who had recently left the employ of Mr. and Mrs. Piper. The suggestion of Miss Nichol as the subject of experiment produced a violently unfavourable reaction in the wife, and she told the husband in clear terms that his suggestion was wholly abhorrent to her. The husband did not again mention Miss Nichol to the wife in this connexion, but towards the end of 1949 he told her that he had found another woman and was no longer seeing Miss Nichol. This statement the wife later found to be untrue, though she believed it at that time. The wife asked the husband for the name of the woman with whom he was associating. He refused to tell her, but it was in fact Miss Nichol. The wife told the husband that his conduct was causing her great unhappiness, and he promised to give up the other woman, though not at once. The husband made no attempts to have sexual intercourse with the wife between October, 1949, and March, 1950. Soon after March, 1950, he told the wife that he had given up the other woman (which was untrue) and thereafter he made some, but only partially successful, attempts at sexual intercourse with the wife.

In June, 1950, the husband confessed that he had in fact only just given up the other woman—information which made it clear to the wife that his story in March was untrue. The wife was naturally much shocked by this revelation. Finally, in September, 1950, the husband confessed that his mistress had throughout been Miss Nichol; he said that he could not give her up, and asked the wife's leave to see Miss Nichol two or three times a

week. To this suggestion the wife would not agree. Faced with this refusal, the husband left the wife on October 11, 1950, and never returned to her, but cohabited openly as man and wife with Miss Nichol. On October 16 he wrote to the wife a frank letter, in which he admitted the faults to be wholly his, and stated his deep affection for Miss Nichol and his desire to marry her. This letter the judge regarded as genuine and not written with any ulterior motive.

Colin Duncan for the King's Proctor. The burden of proof is upon the petitioner, but that burden is initially discharged by the provisional presumption of innocence: see *Moorsom v. Moorsom*¹; *Churchman v. Churchman*.²

The principle on which the rule as to connivance has been founded is *volenti non fit injuria*: *Rogers v. Rogers*³; *Gipps v. Gipps and Hume*.⁴ Where consent is given, even though grudgingly, the motive is immaterial, and the use of the words "corrupt intention" in relation to connivance does not mean that there can be no connivance if the underlying motive is good.

The court must consider whether there has been connivance upon the facts of each case and in the light of all the attendant circumstances. [He referred to *Churchman v. Churchman*⁵; *Douglas v. Douglas*⁶; *Phillips v. Phillips*.⁷]

[His argument upon the question whether after connivance there can be relief for subsequent adultery is indicated towards the end of the judgment.]

A. Richard Ellis for the petitioner. I submit that in this case there was no consent, or alternatively no willing consent, and no corrupt intention. The facts were such as to overbear the wife's mind, having special regard to the health of both parties; but if there were consent, the grudging consent given did not amount to connivance. [He referred to *Walker v. Walker* (Consistory Court M.T. 1796),⁸ cited in *Rogers v. Rogers*⁹ and cited in *Lloyd v. Lloyd and Leggeri*,¹⁰ and to *Allen v. Allen and D'Arcy*,¹¹ cited in the same case.] *Woodbury v. Woodbury*¹² emphasizes, in my submission, that any consent given must be willing. The husband here, as in that case, would not have been deterred even

¹ (1793) 3 Hagg.Ecc. 87, 107.

² [1945] P. 44, 50.

³ (1830) 3 Hagg.Ecc. 57, 58.

⁴ (1864) 11 H.L.C. 1, 25.

⁵ [1945] P. 44, 52.

⁶ [1951] P. 85, 96.

⁷ (1844) 3 Notes of Cases 444, 480.

⁸ (1796) cited 3 Hagg.Ecc. 59, n. (a).

⁹ 3 Hagg.Ecc. 57, 59.

¹⁰ [1938] P. 174, 181, 189.

¹¹ (1859) 30 L.J.P. 2.

¹² [1949] P. 154, 159-60.

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if the wife had not consented in any way. [He referred also to the definition of consent in the Oxford English Dictionary and in Stroud's Judicial Dictionary, and to *Haviland v. Haviland*,¹³ in which it had been held that there was not consent.]

It is not, it is submitted, right to say that motive is immaterial: see, for example, *Woodbury v. Woodbury*,¹⁴ where great weight was attached to the motive. The wife in this case was concerned to preserve the marriage, and to prevent her husband having a further breakdown in health.

But even if connivance is found in respect of the earlier adultery, I submit that there is no direct authority to preclude the petitioner from relief in respect of the later adultery to which she clearly did not consent. Dicta to the contrary in *Gipps v. Gipps and Hume*¹⁵ are obiter.

Cur. adv. vult.

KARMINSKI J. read the following judgment:—This is an undefended petition by a wife by which she prays for the dissolution of her marriage with the husband on the ground of his adultery with a Miss Patricia Nichol. When the case first came before me on June 4, 1951, it was fully and carefully opened on behalf of the wife by Mr. Ellis, who pointed out that on the particular and unusual facts of the case the court would have to inquire into questions of connivance. The petitioner, in her evidence, gave a detailed history of her married life with the husband; and further evidence was called which proved to my satisfaction the adultery alleged in the petition.

So far as the wife's evidence was concerned, I was satisfied that it was the evidence of a completely honest and candid witness. Subsequent inquiries made by the King's Proctor have in no way thrown doubts on her veracity, and I am therefore able to treat her evidence as being in my view in all respects accurate. But at the first hearing I was much concerned by the question whether or not there had been any connivance on the part of the wife. As difficult questions of law appeared to be involved, I thought it right to invoke the assistance of the King's Proctor under section 10 (1) of the Matrimonial Causes Act, 1950. In the result I have had the advantage of a full argument from both Mr. Ellis for the wife and from Mr. Colin Duncan, who appeared for the King's Proctor; and I am much indebted

¹³ (1863) 32 L.J.P. 65.

¹⁵ 11 H.L.C. 1, 13.

¹⁴ [1949] P. 154.

to both counsel for the care and thoroughness with which they argued the principles of law involved.

Where a question of connivance arises, it is of primary importance to consider first the facts of the particular case. It has recently been pointed out by the Court of Appeal that in the past difficulty has been occasioned by judges going beyond the facts of a particular case in an attempt to lay down general principles of wide application (see *Churchman v. Churchman*¹⁶). I have to consider whether on the facts of the present case the petitioner was or was not guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the husband's adultery. I must therefore examine the evidence in this case and state my findings, a task made both easier and pleasanter by the wife's complete candour.

[His Lordship then stated the facts as set out above and continued:] On these findings I have to decide whether the wife has connived at or been accessory to the adultery. The duty of the court to inquire into connivance is now set out in section 4 of the Matrimonial Causes Act, 1950. This section has re-enacted the provisions of section 4 of the Matrimonial Causes Act, 1937, and it provides that if the court is satisfied that the petitioner has not in any manner been accessory to or connived at the adultery it shall pronounce a decree, but if the court is not so satisfied it shall dismiss the petition. This does not mean that there is a presumption of guilt on the part of the petitioner which she must disprove. As Lord Merriman P. pointed out in *Churchman v. Churchman*,¹⁷ the issue does not arise at all unless there are circumstances such as to lead to a suspicion of connivance calling for investigation. The presumption of law is against connivance. But once, as in this case, the suspicion of connivance has been aroused, then the burden of dispelling suspicion must be on the petitioner.

Connivance was made a statutory bar to relief by section 30 of the Matrimonial Causes Act, 1857, but a similar bar was known to and imposed by the ecclesiastical courts for many years before that date. In 1830 the law, as it then stood, was reviewed by Sir John Nicholl in *Rogers v. Rogers*,¹⁸ when a number of earlier cases, mostly decided by Lord Stowell, were examined. Sir John Nicholl said¹⁹: "Without doubt, connivance on the part of the husband will, in point of law, bar him from obtaining relief on account of the adultery which he

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¹⁶ [1945] P. 44, 52.

¹⁷ Ibid. 50.

¹⁸ 3 Hagg.Ecc. 57.

¹⁹ Ibid. 58.

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"has allowed to take place. Volenti non fit injuria is the principle on which the rule has been founded." And Sir John Nicholl proceeded, after citing authority: "It has always been held that there must be consent. The injury must be volenti. . . . It must be intentional concurrence in order to amount to a bar."

A further exhaustive examination of the law relating to connivance was made in 1844 by Dr. Lushington in *Phillips v. Phillips*,²⁰ when the observations of Sir John Nicholl in *Rogers v. Rogers*¹⁸ were considered and followed. Dr. Lushington added the following general observations²¹: "To constitute connivance, I think, the cases go the length of establishing that there must be actual knowledge, that is, proof of knowledge or irresistible presumption of knowledge, of the adultery or of the improper familiarities; and I think the cases require a corrupt connivance—that it is not enough for the husband to be merely blind, inattentive, or negligent, but the word 'connivance,' as it is defined by Lord Stowell and Sir John Nicholl, infers corruption."

It is of the essence of connivance that the consent should anticipate the adultery committed by the other spouse. As Lord Merriman P. pointed out in *Churchman v. Churchman*²²: "The material event is the inception of the adultery and not its repetition; although the facts may be such that connivance at the continuance of an adulterous association shows that the spouse must be taken to have connived at it from the first." It has frequently been pointed out that negligence by itself is not consent; and in *Phillips v. Phillips*²⁰ Dr. Lushington found on the facts of the case that the petitioner husband had been guilty of most culpable negligence and the most supine inertness in what concerned his own honour, but acquitted him of corrupt connivance.

Consent must require the element of agreement, voluntarily entered into. Clearly there cannot be consent if agreement is exacted by coercion. Once a spouse has consented to the adultery of the other spouse I do not think that much assistance is to be found in the epithet corrupt. I agree with the view expressed by Langton J. in *Lloyd v. Lloyd and Leggeri*²³ that corrupt connivance is connivance with an epithet. If there is consent to the intended adultery, the ultimate object behind the consent

¹⁸ 3 Hagg.Ecc. 57.

²⁰ 3 Notes of Cases 444.

²¹ Ibid. 485.

²² [1945] P. 44, 50.

²³ [1938] P. 174, 189.

seems to be of small, if of any, importance. It may be (as in the present case) that the consenting spouse hopes by consenting to bring the other spouse to reason and to preserve the marriage. At the other end of the moral scale the consenting spouse may be plotting with the other spouse to obtain damages from a co-respondent.

Of the many cases cited to me in argument, the large majority dealt with connivance by a husband petitioner. I do not think that there is anything more than an historical significance in this. Before the Married Women's Property Act, 1882, the position of a married woman was usually one of financial dependence on the husband. In return the husband was considered to have special duties in protecting his wife's and his own honour. But I can find no authority which suggests that connivance has to be considered differently in its application to the sexes, and I do not think that any such difference exists in principle. But due regard must still be paid to the position of a wife as such in deciding whether she has consented to adultery or has been in some way forced into withdrawing her opposition.

In his argument Mr. Ellis laid emphasis on the need for consent to be a willing consent, and relied on two cases in particular: *Allen v. Allen and D'Arcy*²⁴ and *Lloyd v. Lloyd and Leggeri*.²⁵ In *Allen v. Allen and D'Arcy*²⁴ the parties were married in 1852 and in 1858 they separated on the respondent discovering that the husband petitioner was committing adultery with a certain woman. On the discovery being made the petitioner withdrew from cohabitation and went to live with the named woman with the intention of going with her to America. The respondent, however, followed him and induced him to return and shortly after their reconciliation the spouses became acquainted with the co-respondent. It was alleged on behalf of the wife that the petitioner had conspired with other men, in addition to the co-respondent himself, to procure adultery between the wife and the co-respondent. In directing the jury on the law applicable to the facts Hill J. said²⁶: "To find a verdict of connivance, you must be satisfied from the facts established in evidence that the husband so connived at the wife's adultery as to give a willing consent to it. Was he, or was he not, an accessory before the fact? Mere negligence, mere inattention, mere dullness of apprehension, mere indifference will not suffice; there must be an intention on his

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²⁴ 30 L.J.P. 2.²⁶ 30 L.J.P. 2, 4.²⁵ [1938] P. 174.

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“part that she should commit adultery. If such a state of things existed as would, in the apprehension of reasonable men, result in the wife’s adultery—whether that state of things was produced by the connivance of the husband or independent of it—and if the husband, intending that the result of adultery should take place, did not interfere, when he might have done so, to protect his own honour, he was guilty of “connivance.” On this direction the jury found that the petitioner had connived at the wife’s adultery with the co-respondent and the petition was dismissed.

In *Lloyd v. Lloyd and Leggeri* ²⁷ Langton J. examined this direction and pointed out that Hill J. was directing the jury having regard to the special circumstances of the case. Langton J. criticized that direction in the following terms: “If it is intended thereby to lay down as a matter of law that there is no such thing as connivance unless the husband actually intends, in the sense of desiring, indeed really to promote adultery, then I do not accept that as being a correct statement of the law. It seems to me entirely at war with all the citations I have made from Lord Stowell and Sir John Nicholl; and, indeed, with subsequent pronouncements on the subject.” I respectfully agree with this criticism, and in my view consent, like intention, is more easily understood without the addition of any epithet.

I have now to consider whether on the law, as I understand it, the wife consented to the adultery of the husband. I have no doubts that when the wife said to the husband that she supposed he had better try if that was what he felt was going to cure him, she gave that permission most reluctantly. I accept also that though she thought he would probably try to commit adultery, she was very doubtful of the success of his attempts. Further, I remind myself that when this permission to commit adultery was granted by the wife to the husband she was herself in poor health and was genuinely concerned at the possibility of a recurrence of mental illness on the husband’s part. But I have to consider whether or not the wife’s will was so overborne by the husband’s persistence or by the attendant circumstances, or by both, that she was coerced into granting permission. The wife is an intelligent woman with professional qualifications; she is not, in my view, though a woman of normal and perhaps acute

²⁷ [1938] P. 174, 189.

sensibilities, a person whose will can be easily overborne or whose intellectual faculties can be easily deceived

Mr. Ellis placed great reliance in argument on the recent decision in the Court of Appeal of *Woodbury v. Woodbury*.²⁸ It is, I think, necessary in considering the application of that authority to examine further the facts which were there before the court. The petitioner was the wife, who alleged adultery between the respondent and a Miss Macintosh. The parties were married in 1929; in 1936 Miss Macintosh commenced employment as the governess to the child of the marriage. In 1937 there commenced an adulterous association between the respondent and Miss Macintosh. The petitioner was wholly ignorant of this adultery until February, 1940, when she learned of it through an anonymous letter. The news of this adultery carried on behind her back by the respondent, whom she loved deeply, and Miss Macintosh, whom she liked and trusted, was a shattering blow to the petitioner. She appealed both to the husband and to Miss Macintosh to break off their adulterous association, but her appeals failed. In March, 1940, she wrote two letters to Miss Macintosh suggesting that the adultery should continue on terms that the child was not to be with the respondent and Miss Macintosh, and that the respondent should live with the petitioner as her friend. This suggestion was never acted upon; later letters from the petitioner made it clear that she was again begging the respondent and Miss Macintosh to break off this adulterous connexion, and by June, 1940, all traces of connivance had disappeared.

In July, 1940, the petitioner, after a brief reconciliation with the respondent, took the child to America and remained there until October, 1947. The respondent and Miss Macintosh committed further adultery in 1940 and 1947. On these facts it was clear that the petitioner could not have connived at the initiation of the adultery in 1937 since she was at that time ignorant of it. But, as Bucknill L.J. pointed out,²⁹ if she, with a corrupt intention, then behaved in such a way as to promote or encourage the continuance of the adultery, then she would have been guilty of connivance. All the three judgments in the Court of Appeal emphasized that the petitioner's conduct had to be considered as a whole. Somervell L.J. put it in this way³⁰: "She is entitled "to be judged in the light of her initial reactions and the attitude "which she took up when she recovered from her operation, and,

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²⁸ [1949] P. 154.³⁰ Ibid. 164.²⁹ Ibid. 159.

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“ indeed, before that, on May 1, 1940. If it could be shown
 “ that, in spite of her condition, she had acted in a way which
 “ had in fact promoted adultery which would not otherwise have
 “ taken place, a question would arise which does not arise here.
 “ A case like the present, where the wife on discovering the
 “ adultery does her utmost to stop it, where the conduct relied
 “ on takes place after she has realized that this is at the moment
 “ hopeless, and against a background of hope that the husband
 “ will ultimately return: such a case is a long way from what
 “ I may call the primary conception of connivance. I am,
 “ however, not suggesting that, as a matter of principle, such
 “ facts might not be consistent with connivance. This is, I think,
 “ a good example of a case which turns on its own particular
 “ facts.” Tucker L.J.³¹ agreed that the conduct of the wife must
 be considered as a whole and not by examining in isolation a few
 letters. The Court of Appeal upheld the finding of the trial judge
 (Wallington J.) that the petitioner had not connived at the
 respondent’s adultery.

I have set out the facts at some length because it was suggested
 in argument that they were very similar to those in the present
 case. To my mind there is one vital difference. Mrs. Woodbury
 knew nothing of her husband’s adultery until at least two years
after its inception; Mrs. Gorst knew of her husband’s intention
 to commit adultery *before* it was committed. I do not think that
 the Court of Appeal in *Woodbury v. Woodbury*²⁸ intended their
 general observations to apply to a case like the present where, as
 I find, the petitioner wife consented (though reluctantly) to her
 husband’s proposed adultery.

A further difficulty now remains. I have found that the wife
 consented to the husband’s adultery before its inception, but
 clearly excluded from her consent his adultery with Miss Nichol.
 In fact, the adultery alleged in these proceedings is adultery with
 Miss Nichol and with no other woman. This question now arises:
 can a petitioner give a consent to adultery excluding a person or
 class of persons and thereafter escape a finding of connivance if
 the adultery has been committed with the person or persons
 excluded?

There have been many passages in decided cases and in the
 textbooks which suggest that adultery with one person which has
 been connived at excludes all relief in respect of subsequent
 adultery with another. Mr. Duncan for the King’s Proctor agreed

²⁸ [1949] P. 154.

³¹ *Ibid.* 165.

that the principle thus stated is too wide and suggested in its place the proposition that once the court has found connivance it must investigate all the circumstances, including the lapse of time between the adulteries, and then decide whether or not the connivance has spent its force before the subsequent adultery has been committed. I believe this to be the true view. Two cases can be cited to illustrate the point. In *Lovering v. Lovering*³² a husband petitioner alleged adultery by his wife with B, which was not disputed by her. But shortly before this adultery the petitioner had noticed great familiarities in his own house between his wife and another man, his own apprentice, whom the petitioner had allowed to continue in his house. There followed, as Lord Stowell (then Sir William Scott) stressed, proved criminality with another man, nearly contemporary. Dismissing the petition, Lord Stowell summed up the matter in the following terms³³: "The case then comes almost to this. Can a man, consenting to adultery with A, but not consenting to adultery with B, take advantage of that adultery, and say to the Ecclesiastical Court — 'non omnibus dormio'? This is language not to be endured. The Ecclesiastical Court requires two things,—that a man shall come with pure hands himself, and shall have exacted a due purity on the part of his wife: and if he has relaxed with one man he has no right to complain of another. I think, in this case, the husband is not entitled to relief, having consented to the turpitude of his wife. I dismiss the suit." But in so expressing himself I do not think that Lord Stowell meant to state that in no circumstances and after no lapse of time could a spouse ever rid himself of the taint of connivance. Indeed, the contrary view was expressed by Sir William Wynne in *Hodges v. Hodges*.³⁴ That case was decided in the Arches Court of Canterbury nearly three years after *Lovering v. Lovering*.³² And it is of interest to note that in *Hodges v. Hodges*³⁴ leading counsel for the petitioner was Sir William Scott himself, though his argument is not reported and it looks possible that Sir William Wynne overlooked *Lovering v. Lovering*³² and also *Timmings v. Timmings*.³⁵ In *Hodges v. Hodges*³⁴ the material point was this: the petitioner had connived at the respondent wife's adultery before 1785, when they separated. The adultery complained of by the petitioner was with another man and began in 1789. Sir William Wynne found on those facts that the connivance was not proved: as reported his reasons are not very

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³² (1792) 3 Hagg.Ecc. 85.³³ Ibid. 87.³⁴ (1795) 3 Hagg.Ecc. 118.³⁵ (1792) 3 Hagg.Ecc. 76.

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clearly stated, but I think his decision was based on the lapse of time between the adulteries and the inference that the connivance of 1785 had, on the facts of the case, spent its force by 1789.

The doctrine that connivance at adultery with one person precludes relief on the ground of adultery with another finds its greatest support in some observations to be found in *Gipps v. Gipps and Hume*.³⁶ In his speech Lord Westbury L.C. used the following expressions³⁷: "If a husband is proved to have connived at the adultery of his wife with A, he cannot obtain a dissolution of marriage on account of her adultery with B: nor if he has connived at adultery committed by his wife with a particular person at one time, can he complain of adultery committed with the same person at a subsequent time." These observations were, in my view, obiter, since they were not necessary to the decision of the case then before their Lordships. Lord Chelmsford³⁸ appeared to dissent from Lord Westbury's observations, but pointed out³⁹ that he was confining himself to the case before him which was that of a husband who had sold his right to a separation to the wife's paramour and could not thereafter obtain relief on the grounds of her adultery with the same individual. Mr. Gipps made no charge against his wife of adultery with anyone except Mr. Hume; he had taken money from Mr. Hume and then left his wife to resume her adulterous association with him. While the principle suggested by Lord Westbury L.C. which I have quoted must be regarded with respect, I am not bound by it and do not propose to follow it.

Having discussed the principles of law involved, I must now apply them to the facts of this particular case. The wife gave a general consent to the husband's adultery with Miss Nichol in October, 1949: I find that his adultery with Miss Nichol commenced not later than January, 1950, when he told her that he had found another woman, though the exact date cannot be ascertained with certainty. He told the wife that the woman was not Miss Nichol, but this was untrue. The wife begged him to give up the other woman, and in March, 1950, he told her (though again untruly) that he had done so. Acting in the belief that the husband was telling her the truth, the wife forgave him and attempts were made to renew sexual intercourse. In short I find that the wife condoned the adultery at which she had connived in the erroneous belief that the adultery had ceased.

³⁶ 11 H.L.C. 1.³⁷ Ibid. 13.³⁸ Ibid. 28.³⁹ Ibid. 29.

The husband continued his adultery, and this was later discovered by the wife.

I have to ask myself whether the wife's connivance had spent itself. The question is not an easy one to answer, but after full consideration I am of the opinion that it had, since she withdrew her consent to his adultery and forgave his past adultery before the present petition was filed. I am satisfied that the wife has not connived at the husband's adultery within the meaning of section 4 of the Matrimonial Causes Act, 1950, and I pronounce a decree nisi of dissolution accordingly.

Decree nisi.

Solicitors: *Hunters; The Official Solicitor.*

J. B. G.

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Pearce J.

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Where an order for the maintenance of children has been made for tax purposes in a form directing payment to the children and not to the wife, and the husband is in arrears, an application for leave to issue a judgment summons may not be granted to the wife; for the whole basis and object of an order requiring payment to the children directly is that the money should be their income, and belong to them, and it is only on that basis that a benefit is obtained in respect of tax.

EX PARTE APPLICATION for leave to issue a judgment summons. The matter was adjourned into court for judgment.

The registrar had made an order on an application by the wife on November 22, 1949, to provide for the maintenance of two children of her marriage. For tax purposes the order was made in a form directing payment not to the wife but to the children, namely, "that the respondent do pay or cause to be paid to [D. R. S. and L. C. S.] the children of the marriage the sum "of £1 per week each." The husband failed to maintain the payments, and the wife applied for leave to issue a judgment summons in respect of the arrears.

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The registrar had also made a nominal order for the maintenance of the wife upon which no question arose in these proceedings.

L. F. Sturge for the wife.* The jurisdiction to commit is conferred by section 5 of the Debtors Act, 1869. That section is careful not to lay down that the only proper person to apply is the person to whom the money is owing. The essence of the procedure is that the debtor is guilty of contempt in disobeying the order. Where the subject-matter of the order is the payment of money, this procedure under the Debtors Act supersedes the older form of attachment for contempt: see *Hewitson v. Sherwin*.¹

This order was obtained at the instance of the wife and for her benefit, at least indirectly, and, it is submitted, there is no reason why she should not enforce it. *In re Cox-Sinclair; Ex parte Jones*,² shows a settled practice entitling a petitioner to enforce an order directing payment to a third party. It also decides that the solicitor cannot apply in his own right.

*In re a Debtor*³ and *Ex parte Muirhead*⁴ are clearly distinguishable. A debt for the purposes of bankruptcy procedure is entirely different from a debt under the Debtors Act: see *Linton v. Linton*.⁵

Cur. adv. vult.

PEARCE J. delivered the following reserved judgment in open court:—In this case the wife petitioner wishes to issue a judgment summons in her name in respect of an order for payment of maintenance to two children of the marriage. For tax purposes the order was made in a form directing payment not to the wife but to the children. Such orders are not infrequent.

Counsel for the wife relies on *In re Cox-Sinclair; Ex parte Jones*.⁶ In that case an order for costs was made in favour of the petitioner's solicitor. The solicitor issued a judgment summons in his own name. Objection was taken that the judgment summons should have been issued in the petitioner's name. Phillimore J. held that the objection was fatal, and dismissed the summons, but gave leave to issue a fresh summons. That judgment clearly implied that a judgment summons could have been issued by the petitioner.

The basis of that decision was explained by Lord Hanworth

* The argument is reported with the consent of the court and is based on information courteously supplied by counsel.

¹ (1870) L.R. 10 Eq. 53.

² [1913] W.N. 263.

³ [1929] 2 Ch. 146.

⁴ (1876) 2 Ch.D. 22.

⁵ (1885) 15 Q.B.D. 239.

⁶ [1913] W.N. 263.

M.R. in *In re a Debtor*,⁷ where he said⁸: “The principle raised “seems to me to have been the basis of the judgment of Phillimore J. in *Ex parte Jones*,⁶ where he pointed out that the “right party had not been put forward as principal to initiate “proceedings against the debtor. Also, in *Ex parte Muirhead*”⁹ “I think that in the judgment of Cockburn C.J. there is the “same intention to indicate that the person at whose suit proceedings are taken must be the principal, the person in whose “interest those proceedings are necessary. In my opinion the “petitioning husband in this case was the person who was really “the principal, for whose indemnity legal proceedings were “necessary. The solicitors were merely acting as a necessary “part of the machinery, under which the sum enured for the “benefit of the petitioner; but they were not the principals as “against the debtor.”

Lord Hanworth M.R. was there dealing with the question whether a solicitor who had an order for costs could come within the meaning of “a creditor” under the Bankruptcy Act, 1914; but his reasoning as to the principle underlying the brief report of the judgment in *In re Cox-Sinclair; Ex parte Jones*,⁶ is equally applicable to the case before me, which comes under section 5 of the Debtors Act, 1869. That section regulates so far as monetary orders are concerned the old remedy by writ of attachment for contumacious refusal to carry out an order: see *Hewitson v. Sherwin*.¹⁰

The words of the section do not expressly state who is entitled to apply to enforce the order, nor say that only the recipient may do so. But the section is expressed to be subject to the prescribed rules. By rule 4 of the General Rules under the Debtors Act, 1869,¹¹ the order for committal “may be in Form A in the “schedule or to the like effect.” Form A is headed: “Upon “hearing, etc. (Christian and surname of the debtor and the “party claiming).” It continues: “I do order that the said “A.B. be for default of the debt hereinafter mentioned committed “to prison . . . or until he shall pay £—, being the amount of “[an instalment due to the said C.D.] or [a judgment of the “Court of —] or [an order made by —]. . . .”

By rule 5 the debtor is entitled on payment of the sum mentioned in the order to a certificate of satisfaction in the

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⁶ [1913] W.N. 263.⁷ [1929] 2 Ch. 146.⁸ *Ibid.* 152.⁹ 2 Ch.D. 22.¹⁰ L.R. 10 Eq. 53.¹¹ See [1870] W.N. (Pt. 2) 274; Williams on Bankruptcy, 16th ed., pp. 873-4.

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Form B in the schedule or to the like effect signed by the attorney in the cause of the creditor or signed by the creditor.

The jurisdiction and powers of the High Court under section 5 of the Debtors Act, 1869, so far as they relate to default in payment in pursuance of any order or judgment made or given by a judge exercising jurisdiction in matrimonial causes, were assigned to the Divorce Division by the Debtors Act (Matrimonial Causes) Jurisdiction Order, 1932.

It is clear that the rules under the Debtors Act, 1869, anticipate that the application will be made by the party in whose favour the order is made, and in my view that was their intention. Moreover from a practical point of view if the wife were to issue this summons there would be no one who could give the husband the valid certificate of satisfaction to which he is entitled under the rule 5. *Ex parte Jones*,¹² as explained by Lord Hanworth M.R., does not help the wife. There the petitioner was entitled to apply because, in the words of Lord Hanworth M.R., he was "the person in whose interest those proceedings are necessary, "the person who was really principal for whose indemnity legal "proceedings are necessary," whereas the solicitors in whose favour the order was made "were merely acting as a necessary "part of the machinery under which the sum enured for the "benefit of the petitioner; but they were not the principals as "against the debtor."

But in the case before me it cannot be said that the petitioner is the principal and the children are acting as a necessary part of the machinery under which the sums enure for the benefit of the petitioner. The whole basis and object of an order directing payment of the money to the children direct is that the money should be their income and belong to them. It is only on that basis that a benefit is obtained in respect of tax. It may be that in practice the petitioner administers it for their benefit, but, if so, she does so only as agent for them and on their behalf. She has no legal right to touch the money.

Although it would be preferable on technical and social grounds, if the judgment summons in respect of this order could be issued by the petitioner rather than the children, I am bound regretfully to hold that it cannot. The application is therefore refused.

Application refused.

Solicitors: *May, May & Deacon.*

J. B. G.

¹² [1913] W.N. 263.

SHELLEY v. SHELLEY (No. 2).

1951
Nov. 30.

Divorce—Judgment summons—Order directing payment to children for tax purposes—Application by wife as next friend.

Lord Merriman P.

A wife may be granted leave to issue a judgment summons as next friend of her children in cases where on her application the court has made an order directing payments to the children for tax purposes.

Shelley v. Shelley (No. 1), ante, p. 107, distinguished.

EX PARTE APPLICATION for leave to issue a judgment summons. The matter was adjourned into court for judgment.

The facts are as stated in *Shelley v. Shelley* (No. 1),¹ except that following the dismissal of her summons in that case the wife applied to the court as next friend of the children.

L. F. Sturge for the wife as next friend to the children.

LORD MERRIMAN P. delivered his judgment in open court and said:—This is an ex parte application by the wife, who has obtained a decree absolute against her husband, for leave to issue, as next friend of the children, a summons under section 5 of the Debtors Act, 1869, against her former husband in respect of arrears of maintenance payable to them.

Under the Bankruptcy Rules relating to judgment summonses (1915), rule 375, it is necessary to obtain leave of a judge for the issue of the summons. The order in respect of which it is desired to proceed is an order made under what is now section 26 (1) of the Matrimonial Causes Act, 1950, which reproduces section 193 of the Supreme Court of Judicature (Consolidation) Act, 1925. By that section: "In any proceedings for divorce . . . the court "may from time to time, either before or by or after the final "decree, make such provision as appears just with respect to the "custody, maintenance and education of the children the marriage "of whose parents is the subject of the proceedings."

Provision can be made for the children in several ways. In fact in this case, by an order of November 22, 1949, made at the instance of the petitioner, who was the proper party to apply, Mr. Registrar Long ordered maintenance for her at the token rate of one shilling per annum, payable monthly, and further ordered the husband to pay, or cause to be paid, to each of the two named

¹ Ante, 107.

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man P.

children of the marriage, the sum of £1 a week each, payable weekly, until they should respectively attain the age of 16. It was also ordered that the wife and the husband should share the income tax relief in respect of the same children.

An order, as is well known, is often in this particular form for the express purpose of avoiding the inclusion of the income payable under the order with any other income that the wife may happen to have, and that is shown clearly on the face of the order by the express provision that I have just mentioned about sharing the income tax relief.

The order in this form has that particular advantage, but it has the disadvantage, which has appeared in the course of this case, that difficulties may arise, in case the husband makes default in payment, in enforcing the order. The earlier history of this case is that the wife applied to Pearce J. for leave to issue a summons, she herself being the applicant. I have had the advantage of reading the considered judgment of Pearce J., who decided, obviously with some reluctance, but, if I may say so, correctly, that she was not entitled to make the application in that form.²

It is not necessary to set out all the reasoning. The substance of the matter was that the judge took the view that the whole frame of the Debtors Act, 1869, and the rules under that Act, made it clear that the person to make the application was the person entitled to the fruit of the judgment. Hence the wife is now applying to be allowed to issue this summons as next friend of the two children in whose favour the order was made.

I know nothing about the merits of the case, which will all have to be investigated later, but there is, on the face of the summons, a statement that a very considerable sum is due, under the order, to these two children. There is no doubt (and there has been no doubt for many years) that arrears of maintenance are the proper subject of proceedings under section 5 of the Debtors Act. Rule 61 of the Matrimonial Causes Rules, 1950, provides, omitting immaterial words, that "An application . . . for committal shall be made to a judge . . .", but it does not specify how, or by whom, it should be made. By what are sometimes called "the sweep-up rules" at the end, and in particular by rule 80, it is provided that: "Subject to the provisions of these rules and of any enactment, the Rules of the Supreme Court shall, notwithstanding the provisions of Order 68 thereof,

² Ante, 107.

“ apply with the necessary modifications to the practice and
 “ procedure in any cause or matter to which these rules apply.”

I need not go into an elaborate review of the way that works out; suffice it to say for the purpose of this case that since neither the method of application nor the party to apply is defined in the Matrimonial Causes Rules, that brings into play R.S.C., Ord. 42, r. 26. By that rule: “ Any person not being a party to a cause
 “ or matter, who obtains any order or in whose favour any order
 “ is made, shall be entitled to enforce obedience to such order by
 “ the same process as if he were a party to such cause or matter.”

Those words are wide enough to cover the case of these two infants. They did not, it is true, obtain the order; it was the wife who obtained the order because, being the petitioner, she was the proper party to obtain it; but plainly the children are persons in whose favour the order was made. Therefore they *prima facie* come within this rule; and without going into unnecessary detail, it is clear from the footnote that the rule (and its predecessors which, I am told, are in substantially the same terms) has been treated for many years past as being applicable to orders made in this Division in connexion with maintenance.

There remains therefore the question how these children, being persons in whose favour this order has been made, are to make the application. The Matrimonial Causes Rules, 1950, are clear on this point, for by rule 64, which relates to proceedings by infants and persons of unsound mind, it is provided in sub-rule (1) (omitting the immaterial words) that: “ An infant . . .
 “ may . . . make any application to which these rules apply by
 “ his next friend.” Plainly this is an application to which these rules apply, and it is suggested that the mother, the wife in this case, is the right person to be the next friend.

It is necessary, therefore, to consider rule 64 (2): “ Before
 “ the name of any person is used in any proceedings as next friend
 “ the solicitor for the infant . . . shall obtain a written authority
 “ signed by that person. The authority shall be attested by a
 “ solicitor, who shall certify that the proposed next friend has no
 “ interest in the proceedings adverse to that of the infant. . . .”

The position at this moment is that Mrs. Shelley has agreed, and has signed the agreement, to act and has stated that she has no adverse interest to the children. *Prima facie* I should have thought that it was plain that not only has she no adverse interest but that she has a favourable interest because the enforcement of this order manifestly is very much in her interest as well as

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that of the children. Subject, therefore, to this authority being attested by the solicitor, I make the order that the wife be allowed to issue the summons as next friend on behalf of the two infants.

Application granted.

Solicitors: *May, May & Deacon.*

J. B. G.

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Feb. 25;
Mar. 7.

Collingwood J.

BOON v. BOON.

Husband and wife—Judgment summons—Unpaid costs of suit—Execution—Exemption from process—Airman—Air Force Act, s. 144 (1) (5).

An airman is protected on a judgment summons by section 144 of the Air Force Act where there is no debt apart from the costs of a divorce suit.

Flanders v. Nicholls (Barnes Notes of Cases, 433) applied.

JUDGMENT SUMMONS.

A wife petitioner, an assisted person whose contribution had been assessed as nil, obtained a decree nisi of divorce in July, 1951. That decree was made absolute on September 11, 1951. On September 21, 1951, she obtained an order for payment of £59 5s., being the amount of her taxed costs. The husband, an airman of the Royal Air Force, made no payments under that order, and the wife accordingly obtained the issue of a judgment summons in respect of the amount due. Complaint was made in accordance with section 144 (5) of the Air Force Act by the husband and his commanding officer that the judgment summons had been issued in contravention of section 144 (1) of that Act.¹

Baskerville, for the wife, opened and referred to the objections taken on behalf of the husband by his commanding officer.

¹ Air Force Act, s. 144: “(1) An airman of the regular air force shall not be liable to be taken out of His Majesty’s service by any process, execution, or order of any court of law or otherwise, or to be compelled to appear in person before any court of law, except in respect of the following matters, or one of them; that is to say—(a) On account of a

charge of or conviction for crime; or (b) On account of any debt, damages, or sum of money, when the amount exceeds thirty pounds over and above all costs of suit. . . . (5) All proceedings and documents in or incidental to a process, execution, or order in contravention of this section shall be void; and where complaint is made by an airman or his com-

Peter Lewis for the husband. The judgment summons is a nullity, for by reason of section 144 of the Air Force Act the court has no jurisdiction to hear it or to compel the husband to attend. It is an execution within the meaning of subsection (1).

The procedure of a judgment summons is provided by section 5 of the Debtors Act, 1869.² That Act abolished imprisonment for debt by section 4, but retained attachment of the person in certain sections, of which section 5 is one. The summons is the successor of the "*capias ad satisfaciendum*" referred to in Blackstone's Commentaries, 5th ed. (1773), Vol. 3, pp. 412 *et seq.*, which was available in case of suits for debt, costs and damages. These are the expressions used in section 144 (1). [He referred to the historical origin of the section.] The fact that the court has power to make an instalment order does not affect the nature of a judgment summons, which is to enforce payment of debt under pain of attachment of the person (as appears from the document itself). [He referred to the Annual Practice, 1951, pp. 740 *et seq.*]

It is conceded that the expression "debt" in the exceptions to section 144 (1) of the Air Force Act includes costs ordered to be paid; but the debt must, it is submitted, be a debt "over and above all costs of suit" if the exception is to apply. The object of the Act is to avoid impairment of efficiency of the Forces caused by personnel being required to attend court, possibly from a distant station, in actions for small debts. It is not contested that other forms of execution or of attachment may be open to the wife.

Section 144 (5) of the Air Force Act makes all proceedings and documents incidental to a process, execution or order referred to in section 144 (1) void; and it is submitted that the judgment summons is such a document and is therefore void.

"manding officer that such airman is
"dealt with in contravention of this
"section by any process, execution, or
"order issued out of any court, and
"is made to that court or to any court
"superior to it, the court or some
"judge thereof shall examine into the
"complaint, and shall, if necessary,
"discharge such airman without fee,
"and may award reasonable costs to
"the complainant, which may be re-
"covered as if costs had been awarded
"in his favour in any action or other
"proceeding in such court. . . ."

[The section corresponds to s. 144 of the Army Act.]

² Debtors Act, 1869, s. 5: "Subject
"to the provisions hereinafter men-
"tioned, and to the prescribed rules,
"any court may commit to prison for
"a term not exceeding six weeks, or
"until payment of the sum due, any
"person who makes default in pay-
"ment of any debt or instalment of
"any debt due from him in pursuance
"of any order or judgment of that or
"any other competent court. . . ."

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Baskerville for the wife. The husband is within exception (b) of section 144 (1) of the Air Force Act, since the money due is a debt exceeding £30 over and above all costs of recovering that debt. But I concede that the husband would have been protected if the costs of the suit had been less than £30.

Cur. adv. vult.

COLLINGWOOD J. stated the facts and continued:—It was contended on behalf of the wife that though the husband's liability had its origin in costs, it had, by reason of the judgment, become a debt and, since it was above the statutory limit of £30 (irrespective of the costs of the judgment summons proceedings), the section had no application.

The exemption of the Forces of the Crown from civil process was first granted under the Conscription Act, 1705, s. 3,³ a temporary measure, the object of which was to secure the personal service of volunteers, not to protect their goods from seizure. In order, as the preamble to the section states, to remedy the "evil practices" which had ensued, the privilege was limited, by a subsequent Act in 1710 (9 Anne, c. 4, s. 3),⁴ in case of arrest

³ Conscription Act, 1705 (4 & 5 Anne, c. 21) ("An Act for the better recruiting Her Majesties Army and Marines"), s. 3: "And for the encouragement of fit and able persons voluntarily to enter themselves in her Majesties service it is hereby further enacted and declared that the officer who is to raise such recruits shall out of the levy money forthwith pay to every person who shall voluntarily enter himself in her Majesties service the sum of 40s. and such officer shall take a discharge under the hand of each volunteer signed in the presence of two or more witnesses testifying his payment of the said 40s. and no person so listed under the hands and seals of three or more justices of the peace or listing himself voluntarily according to the true meaning of this Act as aforesaid shall be liable to be taken out of her Majesties service by any process other than for some criminal matter."

⁴ 9 Anne, c. 4 (1710) ("An Act to continue the Acts for recruiting her Majesties land forces and marines

"for the service of the year 1711"), s. 3: "And whereas divers abuses have been frequently committed by several tradesmen and others in order to defraud their creditors of their just debts under pretence of being listed or entred as volunteers in her Majesties service and at the same time keep houses follow their several trades and employments and appear as persons of reputation which practices tend to the great damage of honest creditors the decrease of personal credit and the great discouragement of trade for remedy whereof and for preventing the like evil practices for the future be it enacted by the authority aforesaid that in case upon any arrest or action to be brought for a just debt (not less than £20 due to one creditor) against any person or persons being or pretending to be listed or entred a volunteer or volunteers in her Majesties service any judge or judges or any other person whatsoever shall discharge such person or persons as a soldier or soldiers duly listed or entred as a volunteer

for debt not less than £20, to soldiers sent abroad beyond the seas within two months of discharge.

The Mutiny Act (1 Geo. 1, c. 3) granted exemption to volunteers in the same words as in the first statute of Queen Anne. By the Mutiny Act, 1718 (5 Geo. 1, c. 5),⁵ the exemption was limited to debts under £10. In 1780 the amount was raised to £20, and in 1830 to £30, where it now stands. By the Act of 1718 the exemption was expressed to be: "unless for a real debt, or other just cause of action, and unless before the taking out such process or execution, not being for a criminal matter, the plaintiff . . . shall make affidavit . . . : that to his knowledge the sum justly due and owing to the plaintiff from the defendant in the action or cause of action on which such process shall issue, or the debt or damages and costs for which such execution shall be issued out, amount to the value of £10 at least." ⁵

In the Mutiny Act, 1739 (3 Geo. 2, c. 10), the wording is changed, and the affidavit must be to the effect: "that to his knowledge, the original sum, justly due and owing to the plaintiff from the defendant, in the action, or cause of action, on which such process shall issue, or the original debt, for which such execution shall be issued out, amounts to the value of £10 at least, over and above all costs of suit in the same action, or in any other action on which the same shall be grounded." ⁶

This new provision was considered by the Court of Common Pleas in *Flanders v. Nicholls*,⁷ in the report of which it is noted: "Defendant, a soldier in His Majesty's Service, was sued by plaintiff in the Marshal's Court for a debt of £3 17s. 4d., and after a writ of inquiry executed in that court, the costs were taxed at £7 14s., and plaintiff signed final judgment for the

"or volunteers in her Majesties service such person or persons shall within two months next after such discharge be actually sent into her Majesties service abroad beyond the seas there to serve her Majesty as a soldier or soldiers and in case such person or persons shall not be actually sent into and continue in the service abroad as aforesaid then from and after the expiration of two months next after such discharge as aforesaid . . . such person and persons so discharged and not sent

"into and continuing in the service abroad as aforesaid shall not have any privilege advantage or protection as a soldier or soldier volunteer or volunteers but any creditor shall be at liberty to proceed against him or them. . . ."

⁵ See Public General edition, 1718, p. 171.

⁶ See Public General edition, 1739, p. 235.

⁷ Barnes' Notes of Cases 433. The note is cited in full.

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“ sum total, being £11 11s. 4d. Defendant moved the judge of
 “ the Marshal’s Court that no execution might be issued against
 “ his person, which upon hearing both sides was ordered, and
 “ the judge directed defendant to apply for costs, in case his
 “ person should be taken in execution. Plaintiff brought an
 “ action in this court upon the judgment, and defendant moved
 “ that the bail-bond might be delivered up, on entering a common
 “ appearance, and obtained a rule to shew cause, and for costs.
 “ The court on shewing cause were of opinion, that though the
 “ clauses in the former Acts of Parliament to prevent soldiers
 “ being taken out of the King’s Service had hitherto been defec-
 “ tive, yet the clause in the last Act, 13 George 2,⁸ is sufficient,
 “ the original debt being under £10, and plaintiff having proceeded
 “ to hold defendant to bail after he knew the opinion of the judge
 “ of the Marshal’s Court, the rule was made absolute in
 “ omnibus.”

From this account it would appear that the court held the view that if the original debt was below the figure in the Act (then £10), but with costs it amounts to more than that sum, and then debt be brought on the judgment, the soldier is entitled to the benefit of the Act.

If, in computing the amount of the debt, in order to ascertain whether it exceeds the statutory minimum, costs of the suit must be excluded, then, in my opinion, it follows that in the present case, where there is no debt apart from the costs of the suit, the airman is protected by the section. It would, I think, be a strange result if, while a judgment for an amount under the statutory minimum, with costs over that sum, was within the Act, an order for the latter alone was not.

The unfortunate result of such protection may well be to deprive a wife (or where, as here, she is a legally assisted person, the taxpayer) of all effective remedy for the recovery of the costs of the suit; a result, I suggest, clearly not envisaged by the Act, and quite outside the mischief at which the provision was originally aimed.

Solicitors: *Good, Good & Co.; Clement G. Lawrence.*

J. B. G.

⁸ Mutiny Act, 1739, note 6, *supra*.

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Oct. 22, 23;
Nov. 2.

Divl. Ct.

Lord Merri-
man, P.,
Collingwood J.

Husband and Wife—Justices—Existing separation order—Wife's subsequent adultery—Application by husband to revoke order—Conduct conducing—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), ss. 6, 7.

It is impossible as a matter of construction to read the wording of section 6 of the Summary Jurisdiction (Married Women) Act, 1895, into section 7 of the Act (as amended by section 2 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925).

If therefore a wife has obtained her order on the ground of one or more of the major matrimonial offences, cruelty, desertion or adultery, it is not unreasonable that she should be unable to invoke the same misconduct as conducing to adultery subsequently committed by her.

Ruther v. Ruther [1903] 2 K.B. 270 applied.

But if the adultery is brought about by a wilful failure to comply with the order itself, the case is different.

Per curiam: In this case it is neither necessary nor desirable to consider the construction of section 7 of the Act of 1895 in relation to matters which would be absolute bars to a petition for divorce on the ground of adultery.

APPEAL from Poole justices.

The parties were married in 1938, and there was one child, born in 1942. On May 14, 1946, the wife obtained a separation order on the ground of her husband's adultery. On May 17, 1951, the husband took out a summons to revoke this order on the ground that the wife had committed adultery. At the hearing before the justices on May 28, 1951, the husband admitted that he was still living with the woman his adultery with whom had been the ground of the order made against him in 1946. He called medical evidence to show that on May 10, 1951, the wife was about 29 weeks pregnant. She did not appear at the hearing, but wrote a letter to the justices in which she admitted a single act of adultery in December, 1950. She went on to say "but if "my husband had been faithful to me it needed never to have "occurred." She further alleged that her husband had been irregular in his payments under the maintenance order, and that she had issued several summonses for arrears against him. This was denied by the husband, who said in evidence that the arrears were only 32s.

The justices dismissed the husband's complaint, stating their reasons as follows:—"On the evidence we come to the conclusion

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"that the wife had committed adultery, but that the admitted
 "continued misconduct of the husband, both before and after the
 "order was made, had conduced to the wife's adultery, that
 "sections 6 and 7 of the Summary Jurisdiction (Married Women)
 "Act, 1895,¹ should be read together, and that the proviso to
 "section 6 which relates to the making of an order also applied
 "to the variation or discharge of the order. We accordingly
 "dismissed the complaint." The husband appealed.

N. R. Baker for the husband.

C. Ingram for the wife.

Cur. adv. vult.

COLLINGWOOD J., reading the judgment of the court, stated the facts and referred to sections 6 and 7 of the Summary Jurisdiction (Married Women) Act, 1895. His Lordship continued:—In our opinion it is impossible, as a matter of construction, to read the wording of section 6 into section 7, and, as will be seen, there is direct authority to the contrary. It might be suggested, however, that in any enactment dealing with the effects of a wife's adultery on her right to maintenance, the principles applicable in matrimonial suits should be imported by implication. For

¹ Summary Jurisdiction (Married Women) Act, 1895, s. 6: "No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery: provided that the husband has not condoned or connived at, or by his wilful neglect or misconduct conduced to such act of adultery."

S. 7, as amended by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (1) (which added the proviso), and s. 1 (1) (as to amount) of the Married Women (Maintenance) Act, 1949: "A court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, in which any order under this Act or the Acts mentioned in the schedule hereto, or either of them, has been made, may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of

"the court at any time, alter, vary
 "or discharge any such order, and
 "may upon any such application from
 "time to time increase or diminish
 "the amount of any weekly payment
 "ordered to be made, so that the
 "same do not in any case exceed the
 "weekly sum of five pounds. If any
 "married woman upon whose applica-
 "tion an order shall have been made
 "under this Act, or the Acts men-
 "tioned in the schedule hereto, or
 "either of them, shall voluntarily
 "resume cohabitation with her hus-
 "band, or shall commit an act of
 "adultery, such order shall upon
 "proof thereof be discharged:

"Provided that the court may, if
 "the court think fit—(a) refuse to dis-
 "charge the order if, in the opinion
 "of the court, such act of adultery as
 "aforesaid was conduced to by the
 "failure of the husband to make such
 "payments as in the opinion of the
 "court he was able to make under
 "the order. . . ."

example, if the concluding sentence of section 7, as amended by the proviso added in 1925, is intended to be absolute and unqualified, it leads apparently to the strange result that the husband can take advantage of an act of adultery which he himself has contrived and connived at for the very purpose of getting rid of the order. But in this case it is neither necessary nor desirable, in our opinion, to consider the construction of this section in relation to matters which would be absolute bars to a petition for divorce on the ground of adultery. We are concerned solely with the question of conduct conducing to the adultery. If the wife, for example, has obtained her order on one or more of the major matrimonial offences, cruelty, desertion or adultery, it is not unreasonable that she should be unable to invoke the same misconduct as conducing to adultery subsequently committed by her. On the other hand, if the adultery is brought about by wilful failure to comply with the order itself, the case is different.

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However that may be, the matter seems to be covered by authority. After all, for 30 years the provision that proof of a subsequent act of adultery involved the discharge of the order stood unqualified by the proviso imported in 1925. It is important, therefore, to see whether there was any authority during that period.

In *Ruther v. Ruther*² the exact point came before a King's Bench Divisional Court. In that case the wife had attempted to enforce an order made in her favour under the Summary Jurisdiction (Separation and Maintenance) Act, 1895, after she had committed an act of adultery. The husband had applied to discharge the order under section 7, but the court had found that the wife had committed the adultery as alleged, but that the husband had by his wilful neglect conduced to that adultery. There were proceedings for his committal to prison to which it is unnecessary to refer in detail, and the matter was brought before a Divisional Court on a case stated. The position, therefore, was that it had been proved that the wife had committed adultery, but that the order had not been discharged because of the finding that the husband's conduct had conduced thereto.

It is unnecessary to consider the preliminary point about the jurisdiction of the King's Bench Division beyond saying that the case has been repeatedly followed on that point, and that the decision on the point with which we are now concerned is binding upon us. It is interesting to note that the very argument which

² [1903] 2 K.B. 270.

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has been addressed to us in support of the justices' reasons in this case was addressed to that court³ and was rejected as impossible by Channell J.⁴ The court were unanimous that the order ought to have been discharged when the adultery was proved, and that the fact that the husband had condoned to the adultery afforded no answer to his application to discharge it. In view of that decision, and of the limited amendment of the law by the proviso added to section 7 of the Act of 1895 by section 2 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, it is not open to us to support the decision of the justices.

*Dutch v. Dutch*⁵ tends to confirm this view in spite of the generality of some of the observations of Hill J., since the conduct conducing which was relied on in that case was clearly the failure to make payments under the order.

In the present case there is no finding that it was any such failure by the husband which conduced to the wife's adultery. It is true that in her letter the wife spoke of having been obliged to apply to enforce the order. We were told that the husband's evidence to the contrary was borne out by the court records. However that may be, it is quite clear that the justices decided this question merely upon the wife's statement in her letter to them that if her husband had been faithful to her her own adultery need never have occurred.

This appeal must be allowed.

Appeal allowed.

Solicitors: *Church, Adams, Tatham & Co., for Trevanion & Curtis, Poole; Barnes & Butler, for J. W. Miller & Son, Poole.*

J. B. G.

³ [1903] 2 K.B. 270, 274.

⁵ (1928) 98 L.J.P. 44.

⁴ *Ibid.* 276.

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March 4, 5.

Evershed M.R.,
 Jenkins and
 Hodson L.JJ.

Divorce — Maintenance — Post-nuptial settlement — Variation — Deed of separation — Application by guilty husband to vary — Application for maintenance — Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 25.

In 1936 a husband and wife entered into a deed of separation under which the husband covenanted to pay to the wife during their joint lives an annuity of £275 free of tax. At the date of the deed the

husband had an earned income of £1,550 a year. The wife petitioned for divorce on the ground of the husband's adultery and a decree nisi was pronounced in January, 1950, which was subsequently made absolute. She filed an application for maintenance which had not been heard. In May, 1950, the husband applied to have the separation deed varied as a post-nuptial settlement. The husband's earned income at the date of the hearing of his application was £450. Collingwood J. held, affirming the decision of the registrar, that the separation deed should be varied by substituting the annual sum of £75, subject to tax, for the sum of £275, free of tax, leaving the wife to apply for an order for maintenance. Since the hearing before the judge, the husband had obtained a post with a salary of £1,250 a year. On appeal:—

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Held, (1) that the court had jurisdiction under section 25 of the Matrimonial Causes Act, 1950, to vary a deed of separation in favour of a guilty husband. (2) That it was not possible satisfactorily to deal with the question of the variation of a settlement except in conjunction with the application for maintenance and ordinarily the two applications should be heard together. The object of the court must be to see that the wife was adequately provided for having regard to the means of both parties and the circumstances of the case. That result could not be satisfactorily achieved if a husband's obligations under a deed of separation were considered as a separate and distinct matter from the question of maintenance. (3) That where the court was exercising a discretionary remedy and the question was what justice required to be done between the parties for an indefinite period, as distinct from the case in which the question was what was the right of a party when he issued his proceedings, the court must have regard on appeal to the new circumstances because they struck at the basis of the decision of the court below. (4) That the husband's changed circumstances made reconsideration necessary. (5) That accordingly Collingwood J.'s order must be discharged and the application to vary the separation deed sent back for further consideration to be heard with the wife's application for maintenance.

Johnson v. Johnson [1950] P. 23 followed.

Decision of Collingwood J. [1951] W.N. 505 reversed.

APPEAL from Collingwood J.¹

The parties were married in 1916. In 1935 the wife filed a petition for judicial separation. That suit was compromised, and the parties entered into a deed of separation which was executed on December 1, 1936. In October, 1949, the wife presented a petition for divorce on the ground that the husband had committed adultery, and a decree nisi was pronounced on January 9, 1950. In December, 1949, the wife had filed a notice of application for

¹ [1951] W.N. 505.

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maintenance; in May, 1950, the husband filed a notice for variation of the deed of separation as a post-nuptial settlement.

On June 6, 1950, the husband issued a summons to show cause why an order should not be made giving him leave to apply for the decree nisi to be made absolute, as the wife had failed to do so. The wife then issued a summons to show cause why a decree of judicial separation should not be pronounced in lieu of the decree nisi. The summonses were heard by Pearce J.² in open court, and the decree was made absolute.

The deed of separation provided, among other things, that the husband should pay the wife *dum casta* and during their joint lives an annual sum of £275 free of tax. The husband applied for the deed to be varied by extinguishing or varying the covenant to pay. The husband had remarried. At the date of the hearing he was about 63 and his former wife 59. Mr. Registrar Forbes in his report said that, whereas in 1936 the husband was enjoying an income of £1,550 a year, his income had been reduced since 1946 to about £450 a year, and his available capital had been put at about £2,500.

The registrar concluded: "In the absence of any authority bearing on circumstances such as arise in this case, I am in some doubt as to whether the principles which have been laid down in regard to variation of settlements can be applied so as to afford the husband the relief he is seeking. Having regard, however, to the somewhat exceptional circumstances which arise in this case, I would submit that there should be a variation of the deed to the extent that the amount which the husband covenanted to pay be reduced to a sum equivalent to the notional income from his available capital, and I estimate that in this connexion such an annual sum would amount to about £75 a year. This would leave the wife free to apply under section 19 of the Matrimonial Causes Act, 1950, for an order based on his earned income, such order being variable at the instance of either party on a change of circumstances."

The registrar accordingly submitted that the settlement be varied by substituting an annual sum of £75 less tax.

The wife applied that the report be varied by substituting £275 a year free of tax or in the alternative £275 less tax, for £75 less tax.

Collingwood J. dismissed the wife's application, holding that the registrar's order made a fair provision for the wife, having

² [1951] P. 32.

regard to the existing circumstances and that the settlement should be varied in accordance with his submission.

Since the hearing before Collingwood J., the husband had obtained a position at a salary of £1,250 a year.

The wife appealed.

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John B. Gardner for the wife. It is submitted that the order of Collingwood J. cannot stand. First, the increased income of the husband has destroyed the basis on which his order was made. Further, it is submitted that he should not have confirmed the registrar's order. A deed of separation is of a different character to an ante-nuptial settlement. A separation deed is drawn up when the parties have separated, and by it the husband agrees to the provisions he will make for the wife during their joint lives. It appears from the decision in *Jump v. Jump*³ that where a husband's means have increased since a deed of separation was entered into the wife can claim maintenance. When a husband is the guilty party, he should not benefit from the decree. Up to 1910 the court had grave doubts whether the guilty party could apply. In *Reid v. Reid*⁴ variation was refused, and so it was in *Colclough v. Colclough*.⁵ Up to 1930 there is no authority for penalizing the innocent party. In *Bowles v. Bowles*⁶ it was considered necessary to hear argument whether the application could be made by a guilty party. The only case where an order was made in favour of a guilty party is *Johnson v. Johnson*.⁷ In that case the innocent wife had remarried. She has not remarried in this case. The present tendency to allow a guilty party to profit by a decree being made against him is, it is submitted, wrong in principle. [He referred to *Saunders v. Saunders*⁸ and *Tomkins v. Tomkins*.⁹]

The result of varying the separation deed in the manner in which it is proposed to vary it would be that the innocent wife's income will be reduced for the benefit of the guilty husband's second wife. It has been suggested that if the separation deed is varied the wife will be adequately provided for by an order for maintenance. That is not so, since any provision by way of maintenance is liable to be varied from time to time, the provisions of the separation deed once varied under the powers conferred by section 25 of the Matrimonial Causes Act, 1950,

³ (1883) 8 P.D. 159.

⁴ [1926] P. 1.

⁵ [1933] P. 143.

⁶ [1937] P. 127.

⁷ [1950] P. 23.

⁸ (1893) 69 L.T. 498.

⁹ [1948] P. 170.

C. A. cannot be varied again. The provision under the deed is accordingly certain, which maintenance is not.

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J. A. Petrie for the husband. The order of Collingwood J. should stand. The wife should get what additional provision she requires on her application for maintenance. It is not the husband's fault that her application for maintenance was not heard at the same time as the application to vary the separation deed. The wife never asked that the two applications should be heard together. The wife, in fact, is not prejudiced by the order which has been made, since she can apply, on her application for maintenance, to have a secured provision made for her.

The fact that the husband's income has increased since the order was made to vary the separation deed is not a circumstance which should now make the court set aside the order. The wife's remedy is to ask for increased maintenance if the husband's income has increased. In making an order for variation the court has to take into consideration all the circumstances: *Constantinidi v. Constantinidi*.¹⁰ This the judge has done in this case, and his order should not be varied. [He referred to *Suart v. Suart*.¹¹]

John B. Gardner in reply. The husband was not prejudiced by the fact that the wife's application for maintenance was not heard with the husband's application to vary the settlement. It was felt that until the position under the separation deed was known the application for maintenance could not be made.

EVERSHED M.R. This appeal raises the question whether this court should vary a deed of separation, which was entered into by the husband and wife in 1936, long before the divorce proceedings upon which, on the petition of the wife, a decree absolute was eventually pronounced against the respondent husband on the ground of his adultery. There is no question but that such a deed is properly treated as a post-nuptial settlement within the terms of the Matrimonial Causes Acts; and there is also, I think, no question but that the court has jurisdiction to vary such a deed, even at the suit of the guilty husband in the divorce proceedings. If authority be needed for the latter proposition, it is to be found in the judgment of this court in the case of *Johnson v. Johnson*.¹² That also was a case in which a deed of separation had been entered into between the two spouses,

¹⁰ [1905] P. 253.

¹² [1950] P. 23.

¹¹ [1910] P. 246.

whose marriage was eventually dissolved (as happened in the present case) upon the wife's petition alleging adultery against the husband. The particular problem in that case arose because there had been a considerable lapse of time before the husband made application to vary the deed, and in the meantime not only had he himself remarried but his former wife, the petitioner, also had remarried. At the beginning of his judgment (to which the other two members of the court assented) Denning L.J. said ¹³ : " It is plain that this separation deed was a post-nuptial settlement which the court has power to vary under section 192 of " the Supreme Court of Judicature (Consolidation) Act, 1925. " Settlements of this kind are always subject to variation by order " of the court in the event of the marriage being dissolved." Indeed, Mr. Gardner, for the appellant wife in this case, has not sought to challenge the existence of the jurisdiction, though he has pointed out, not only with propriety but with force, that the variation of any settlement so as to be beneficial in the result to a guilty husband is not a variation which the court lightly makes—to which, perhaps, one might add that no variation of a deed solemnly entered into is lightly made.

[His Lordship stated the facts and continued :] It remains to me a little obscure on the evidence how the figures were actually arrived at, but I do not propose to take up time about that because, beyond peradventure, the registrar and the judge proceeded on the footing that the husband's income at the relevant date—that is, when the matter came before them for consideration—had been reduced to £450 a year; and, as I have already said, he had become 15 years older since the date of the settlement. Proceeding on that premise, the registrar thought that in justice the deed should be varied by reducing the figure from £275 a year free of tax to the much smaller figure of £75 a year subject to tax. So large a variation would perhaps be startling if it was not clearly pointed out in the registrar's report and in the judgment that the reduced figure and the order made reducing it were without prejudice to the wife's right, as the petitioner in the divorce proceedings, to obtain maintenance; and that, of course, includes secured maintenance. The registrar took the view, having regard to the particular figures which I have mentioned, that the just thing to do was to leave the husband's earnings to be the subject-matter from which maintenance could be ordered. An order for maintenance may be varied from time

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¹³ [1950] P. 23, 26.

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to time, so that the court could adjust the sum payable for maintenance according as his earned income happened to increase or diminish. The registrar thought that under the deed of separation there should only be paid such a sum as might be taken to represent the earnings of the invested capital of the husband. At that time the figure of such invested capital was £2,500, and on a 3 per cent. basis he thought it would be right, therefore, to substitute for the £275 free of tax £75 less tax as being the sum that that invested capital could fairly be expected to earn.

I think that that method of calculating the just sum is open to criticism. The deed of separation provided for payment to be made not during the life of the wife but during the joint lives only of the husband and wife, and, that being so, the existence of this particular sum of capital may be said not to have been the vital consideration. If the covenanted sum had been payable during the wife's life, then, bearing in mind the possibility and, indeed, having regard to their ages it might be said the probability, that the husband would be the first to die, it would be appropriate to look to the capital as the source from which the covenanted sum could be provided after the husband's death. Since the date when the matter was before the learned judge, further facts have come to light. Collingwood J. delivered a reserved judgment in October, having completed the hearing in July. These new facts were certainly unknown to the judge, and of course unknown to the registrar, when they decided the matter according to what they thought, on the facts before them, justice fairly required.

The new facts, putting them quite briefly, are that the husband has been fortunate enough to obtain a position as the managing director of a company in the north of England at a salary of £1,250 a year. It is no doubt true that some deduction may fairly have to be made from that gross sum in arriving at the actual annual income which the husband will have to spend, but it is to my mind beyond question that the new situation resulting from that appointment is quite inconsistent with that which I think to have been the basis on which the registrar and the judge decided, as they did, to vary the deed of separation by reducing the sum payable under it to £75 a year gross.

The question has been debated whether this court ought, on this appeal, to take into account those new facts; but where the court is exercising a discretionary remedy and the question is

what justice requires to be done between these two parties for an indefinite period of time, as distinct from a case in which the question is what was the right of a particular party at the time that he issued his proceedings, I feel no doubt that the court must have regard on appeal to the new circumstances because they strike at the basis of the decision in the courts below. On that ground, and because I have felt doubtful of the propriety of relating the £75 in the circumstances to the produce of the capital, I have come to the conclusion that the decision in favour of the husband represented by the particular variation I have already mentioned is one that ought not to stand.

During the course of the argument picturesque phraseology has at times been used—again naturally enough. It has been urged by Mr. Gardner that in exercising the power to vary a settlement in circumstances such as these, the court should *prima facie* leave matters as they are because otherwise the court is, so to speak, rewarding the guilty husband for his infidelity; and that if the result of divorce proceedings in the present case has been so much to depreciate the wife's financial position then that is something which, on the face of it, seems wrong. I am not, I confess, very greatly moved by that particular consideration. It does not require to be said that the court would not, upon this or any other application, take steps which could only fairly be characterized as rewarding an adulterer for his adultery. On the other hand, the function of the court (and I am, I think, reflecting the language of Lord Greene M.R. in an earlier case of *Tomkins v. Tomkins*¹⁴) is not to punish an adulterer for his adultery: it is, in such a case as this, to see that a wife who has been the petitioner in a divorce proceeding is fairly provided for out of such resources as the husband has and as are fairly applicable to make provision for her.

That brings me at once to the close relationship which I think should be preserved in matters of this kind between what should be ordered for maintenance and what order should be made by way of variation of a post-nuptial settlement. If reference is made to the few cases in the books in which variations of this kind have been made, it will be seen that they are linked with orders for maintenance. Let me take the first case mentioned by Mr. Gardner, that of *Reid v. Reid*.¹⁵ That was a case in which under a deed of separation a wife had been in receipt of a sum of 25s. 0d. a week. Mr. Gardner drew attention to Lord

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¹⁴ [1948] P. 170.¹⁵ [1926] P. 1.

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Merrivale P.'s language¹⁶ indicating the paucity of precedents for variation, at the instance of a guilty party, of a settlement consisting of such a deed as a deed of separation. But the force of that generality is, I think, somewhat qualified when it is observed that at the end of the judgment the President directed maintenance at the rate of 25s. 0d. a week but at the same time imposed on the wife the obligation that, so long as she received that maintenance, she should not enforce the deed of separation at all.

If, therefore, I am right in putting the matter as I have done—that the function and duty of the court is to see that in such a case as this the wife has proper provision made for her from one source or another by her former husband—then I think it is highly important (I had almost said essential, though there may be cases in which it is not practicable for the two things to come on together) that the court should deal with both matters at the same time. The registrar and the judge proceeded, obviously, on the assumption that some appropriate order would be made on the wife's application for maintenance; and if the application for maintenance had come on first, I doubt not that the court, in ordering maintenance, would have had to make some assumption in regard to what would continue to be payable under the deed of separation. It seems to me far more satisfactory, instead of dealing with them separately, to deal at the same time, where it is possible (and it is possible here) with both applications and to decide what should be paid under an order for maintenance (which may be varied from time to time) and at the same time to decide to what extent, if at all, the deed of separation ought to be varied.

Mr. Gardner has pointed out that the great advantage to the wife of preserving rights under the deed of separation is that, once varied upon this occasion, they then remain continuous for the period during which the deed is expressed to operate: they are not liable to further variation. There is, therefore, that security which comes from the certainty that the deed goes on until by its terms it comes to an end. If the deed can be varied at all, I think it is a circumstance that ought to be considered by the court whether it is right that its terms should be limited to the joint lives. Having expressed the view that I have in regard to the new circumstances—that is, new since the matter was considered by the courts below—and having regard to the

¹⁶ [1926] P. 1, 3.

great desirability of these matters being heard together, it will follow that, as I think, the order so far made should be set aside and that this matter should be referred back to the Probate, Divorce and Admiralty Division so as to be heard together with the wife's application for maintenance; and the court can then decide the matter in the light of the facts as they now are or may ultimately emerge, perhaps, as the result of further discovery or cross-examination. The court will properly consider the point I have mentioned as to the duration, according to its terms, of this deed of separation.

Since the matter is being referred back, it is desirable that I should say but little else, because the matter must be one of discretion. I am certainly not, therefore, disposed to embark upon any consideration of the authorities which were considered by the registrar and by the judge, for I think that they both correctly apprehended the law and the powers which were vested in them. I would, however, say just this. I think that whatever view one may take of the conduct of either of these parties from 1936 onwards, it is after all important to note that the deed of separation was entered into upon a certain assumption, namely, that these two parties would remain married but would live apart and that the provision made by the deed was to be the limit of the husband's liability to look after his wife. Whatever her motives may have been, the wife in point of fact, by an act entirely voluntary on her part, destroyed the basis on which this document was entered into and substituted for the state of facts on the basis of which the deed was entered into a new state of facts which involved the right for her to go to the court and seek maintenance *dehors* this deed.

It is not to be forgotten that the obligations of the husband to pay under the deed were limited to the performance by the wife of various covenants—a covenant against molestation, a covenant to remain chaste, and other matters which really can have but little significance today—and I have already alluded to the term of the deed as to its being one for joint lives in any case.

I hope that the parties will find it, through their advisers, not too difficult to reach some sensible accommodation in the matter, and particularly to agree between them a sensible variation of the terms of this deed which would make it at least a deed conformable to the present state of facts. As to the amount, the proper thing to aim at is that the wife should be adequately provided for out of such resources as the husband

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has available for that purpose, whether the provision be under the deed or under the court's order for maintenance. Upon what that figure should be, I prefer to express no opinion, because it may well be that the premise upon which it would be based, namely, the amount of the husband's available resources, has not yet been finally elucidated.

I therefore think that in the circumstances the proper order for this court to make is to set aside the order varying the separation deed in the way I have indicated and to refer the matter of the husband's application for variation back to the court below to be heard and disposed of together with the wife's application for maintenance, which, I assume, she is intending to prosecute with proper diligence.

JENKINS L.J. I agree. As appears from the case of *Johnson v. Johnson*,¹⁷ the court has jurisdiction to vary a deed such as this even in favour of a guilty husband. The question therefore is whether, in all the circumstances of this case, any and if so what reduction should be made in the sum covenanted to be paid by the husband under the deed of December, 1936.

The evidence now before the court as to the husband's present circumstances destroys the essential basis of fact on which the registrar reported and on which the judge confirmed the registrar's report. It follows, in my view, that, as I am clearly of opinion that the evidence as to the husband's present circumstances ought to be taken into account in this appeal, the present order cannot stand and the matter must be reconsidered in the light of the husband's actual circumstances as they now are.

As my Lord has said, I think it is impossible to deal satisfactorily with the question of variation in relation to a deed of covenant such as this, except in conjunction with the whole question of the wife's maintenance. The object of the court must be to see that the wife is adequately provided for having regard to the means of both parties and all the circumstances of the case. I do not see how that end can be satisfactorily achieved if the husband's obligation under a deed of separation, like the present deed, is considered as a separate and distinct matter from the whole question of maintenance. Accordingly, though Mr. Petrie argued, with force, that the wife's advisers might, if so minded, have taken steps to ensure that the application for

¹⁷ [1950] P. 23.

maintenance should be dealt with at the same time as the application for variation of the deed, and therefore cannot now justly complain that the latter application was in the result dealt with separately, nevertheless it seems to me that as the matter must in any case be sent back for reconsideration in the light of the husband's present circumstances, the proper course would be that which my Lord has proposed, namely, to discharge the learned judge's order and send this matter back with a direction that it should be dealt with at the same time as the wife's application for maintenance.

As the matter is being sent back and will fall to be decided in accordance with the discretion of the learned registrar or judge who deals with it, I will refrain from expressing any view as to what the result ought to be, particularly as the information before us as to the husband's present circumstances may not be complete.

HODSON L.J. The application to the court in this case was made by a husband who had been divorced on the ground of his adultery, the application being made under section 25 of the Matrimonial Causes Act, 1950, which provides that "The court "may after pronouncing a decree for divorce . . . inquire into "the existence of . . . settlements made on the parties whose "marriage is the subject of the decree, and may make such "orders with reference to the application . . . of the property "settled either for the benefit of the children of the marriage or "of the parties to the marriage, as the court thinks fit."

It cannot be doubted that there is jurisdiction, on the plain language of the section, to entertain an application by a respondent who has been found guilty of adultery. But the matter has been put before the court on behalf of the wife, if not as a matter of law, at any rate as a matter of principle, that the court should not, as it were, reward a guilty party who has been divorced by enabling him to escape from the contractual obligations which he freely entered into with his wife while the marriage was subsisting—obligations which he could not otherwise have escaped. On the other hand, as the Master of the Rolls has pointed out, the wife, whether urged to by her husband or not, nevertheless initiated the proceedings and altered the situation between herself and her husband. Once she destroyed the marriage by obtaining a divorce, she enabled the jurisdiction to be invoked and enabled the court to regulate the financial position as between herself and her husband as the court thought fit.

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I am bound to say that I think that it is not easy for a man in this position and on these bare facts successfully to achieve the object that I have mentioned. As Lord Merrivale P. pointed out in *Reid v. Reid*,¹⁸ "the records of the court" (up to 1926) "will be searched in vain for any instance where the court at the instance of a guilty party has varied or annulled the settlement "in his favour." On the other hand, as appears from the case of *Johnson v. Johnson*,¹⁹ such an application was entertained by the court and the husband succeeded, although in that particular case there was the important additional fact that the wife had remarried.

So far as the order in question here is concerned, I think that it was arrived at in an unsatisfactory manner. Apart from the change in circumstances which I think necessitates the matter going back for rehearing, it was impracticable to endeavour to deal with the question of variation independently of that of maintenance. Where the object of the variation of a settlement is to alter the amount of the financial provision for children or a wife who is applying for maintenance, it seems to me to be essential that the two matters should be dealt with together: otherwise, difficulties, such as have arisen in this case, must necessarily arise. The registrar, in fixing the amount which he thought ought to be substituted for the amount provided for in the covenant contained in the deed of separation, had in mind an affidavit put in by the husband in the maintenance proceedings in which he stated his average profit from his business over the last three years as £460. That profit had never been investigated: it is merely extracted from a summary of profits and losses as agreed with the inspector of taxes. The wife had never had an opportunity—perhaps through her own fault, as she had not proceeded with the application for maintenance up to that time—of arguing whether the deduction allowed against profits by the Commissioners of Inland Revenue was properly to be allowed against the husband in considering what his available means were for her support. The £75 was fixed by the learned registrar as if he were considering what would be a proper provision to be made for the wife for her life, because he based it on a calculation of the productivity of the husband's investments, whereas what he was considering was what was a reasonable sum to be paid to the wife during their joint lives.

¹⁸ [1926] P. 1, 3.¹⁹ [1950] P. 23.

In any event, therefore, I think that this order must be reconsidered, and I agree that the matter should go back for investigation at the same time as the wife's application for maintenance. This order having been discharged, the application for maintenance must be dealt with promptly.

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Appeal allowed.

Solicitors: *Alfred Cox & Son, for Clarke & Son, High Wycombe; Gregory, Rowcliffe & Co., for Neal, Scorah, Siddons & Co., Sheffield.*

B. A. B.

STARKOWSKI (OTHERWISE URBANSKI, OTHERWISE JUSZCZKIEWICZ) (BY HIS NEXT FRIEND) v. ATTORNEY-GENERAL (STARKOWSKI, URBANSKI AND URBANSKA (OTHERWISE JUSZCZKIEWICZ) (CITED AS JUSZKIEWICZ) (BY HER GUARDIAN) CITED).

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Jan. 14, 15,
16, 17, 18;
Feb. 18.

Barnard J.

Legitimacy—International law—Austrian ceremony of marriage validated by subsequent registration—Petitioner's mother married at that ceremony to man not petitioner's father—Petitioner's birth prior to marriage registration—Petitioner's parents parties to a marriage ceremony after the registration—Second marriage invalid.

Affirmed.
[1952] P.

The parents of the petitioner, who was born in England in March, 1949, went through a ceremony of marriage in England in February, 1950. The petitioner's mother had, however, gone through a previous ceremony of marriage in a Roman Catholic church in Austria in May, 1945, with one of the parties cited. At that time Austrian law only recognized as valid marriages celebrated at civil registries in accordance with the Marriage Law of 1938; but by a special law which came into force on June 30, 1945, provision was made for the validation of other ceremonies by registration. The ceremony of May, 1945, was registered by the authorities (though without the express consent of the parties) in July, 1949. The question accordingly arose whether the ceremony of February, 1950, was a valid marriage and legitimated the petitioner, who was born illegitimate, domiciled in England, and with a potentiality of being legitimated.

Held, (1) That marriage ceremonies performed in Austria are clearly within the power of Austria to validate, and the effectiveness of Austrian laws so validating a ceremony must be recognized by the comity of nations and by English law. That the law of 1945 was in force, though its effectiveness had been delayed, before the petitioner's mother had acquired an English domicile and

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while she was still resident in Austria; it only purported to legislate in regard to something which had taken place in Austria; and it was binding upon her although she had acquired a domicile of choice in this country before the birth of the child and the registration of the marriage;

Bank Voor Handel v. Slatford [1951] 2 T.L.R. 755, *In re Luck's Settlement Trusts* [1940] Ch. 864 distinguished.

(2) That by the clear and unambiguous wording of the Austrian Law of June, 1945, marriages such as the ceremony of May, 1945, have the effect of a valid marriage solemnized in accordance with the Law of 1938 as from the day of solemnization as soon as they have been registered, but not before. The position was not affected by the absence of express consent to the registration of a marriage to which both parties had consented at the time; the registration was a duty imposed upon officials and outside the control of the spouses.

(3) That the relevant time to consider the effect of Austrian law in respect of the first marriage was when the second ceremony took place;

Lynch v. The Provisional Government of Paraguay (1871) L.R. 2 P. & M. 268 distinguished;

(4) That the legitimation of the petitioner, who was born domiciled in England and with the potentiality of being legitimated, finally depended upon the validity of the second marriage. But at that time a marriage valid by the *lex loci celebrationis* was in existence. The second marriage was accordingly invalid, and the petitioner illegitimate.

Quaere, whether the second marriage would or would not have been valid if it had preceded the date of registration. In such a case the court would have to consider whether there might be a state of suspended validity between the coming into force of the Law of June, 1945, and the actual registration. *Lynch v. The Provisional Government of Paraguay*, *supra*, and *Scott v. Attorney-General* (1886) 11 P.D. 128, considered.

LEGITIMACY SUIT.

The petitioner's mother, Henryka Antonia Starkowska ("Henrica"), went through a ceremony of marriage with Ryszard Urbanski ("Richard") at the Roman Catholic Church at Kitzbühl, Austria, on May 19, 1945. They were both Poles, born in Cracow, a bachelor and spinster, domiciled in Poland at the date of the ceremony. A child, Barbara Janina, was born of that union on June 12, 1945. In July, 1945, they left Austria and eventually reached England, where they lived together until 1947. The petitioner was born in England on March 27, 1949, his father being Mieczyslaw Starkowski ("Michael"), and his parents went through a ceremony of marriage in Croydon on February 11, 1950.

At the time of the marriage in Kitzbühl in May, 1945, the religious ceremony did not constitute a valid marriage according to the law then in force in Austria. The German marriage law of July, 1938, was still in force, and by that law a valid marriage could only be concluded before the civil authorities. Austria was liberated on April 27, 1945, and the Provisional Government of Austria published an Order, No. 6, on May 1, 1945, repealing some of the German laws then in force, but confirming for the time being the Marriage Law, 1938.

On June 26, 1945, the Provisional Government of Austria published a further order, No. 31,¹ to come into force on June 30, 1945, to provide for the validation of ceremonies such as that of May 19, 1945, by registration.

The petitioner's mother took no steps to register her first marriage, and after the petitioner's birth in March, 1949, she received information that it had not been registered. She accordingly went through the ceremony of February, 1950; but in the meantime the marriage of May, 1945, had been registered on July 18, 1949, under the law of June 30, 1945, without her knowledge.

The facts are stated more fully in the judgment.

Heathcote Williams K.C. and *Dobry* for the petitioner. The ceremony at Kitzbühl was invalid at the outset because a valid marriage could only have taken place at a civil registry in Austria, and it was well established that in English law a marriage must be celebrated according to the formalities of the place where it takes place: *Berthiaume v. Dastous*,² per Lord Dunedin. The marriage was invalid unless registered under the Austrian law

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¹ Order 31 provides: . . . S. 3:
“(1) Marriages which were solemnized during the period from April 1, 1945, to the coming into force of this law before incompetent lay authorities or before ministers of a recognized church or religious community have the effect of a marriage solemnized at a register office in accordance with sections 15 et seq. of the Marriage Law of July 6, 1938, as from the day of solemnization, as soon as they have been registered in the family book kept by the register office.”

(2) “The offices in which such marriages have been solemnized shall forward without delay to the

register office which would have been competent to solemnize the marriage at the time of its solemnization in respect of the bridegroom, true copies of the entries made in their marriage register showing exactly the words, figures and letters.”

S. 5 (1): “The register offices are to enter in their register the occurrences affecting personal status communicated to them in accordance with sections 1 and 4.”

(S. 4 relates to the registration of births and deaths during the period April 1, 1945, to June 30, 1945.)

² [1930] A.C. 79, 83.

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No. 31 of June 26, 1945. In fact it was not so registered when the petitioner's mother came to England with the legal status of a spinster in 1946, and was joined later in that year by Richard.

[BARNARD J. Would not the registration have been a ministerial act?]

Nothing which the Austrian Republic did later could affect her status as spinster. She had acquired an English domicile of choice and her capacity to marry Michael in February, 1950, was governed by the law of her domicile. In *Apt v. Apt*³ Lord Merriman P. pointed out that although it was the wife's intention when she gave a power of attorney to contract a Christian marriage (by proxy in Argentina) and to acquire the husband's domicile when the marriage was celebrated, she changed her mind and revoked the power before the celebration while still a British subject, and he held that the effect of the revocation should be decided according to English law. This dictum was applied by Hodson J. in *Kenward v. Kenward*⁴ (one of the Russian Bride cases), in which he held, inter alia, that the personal law of each of the parties should regulate the question of want of consent. Here the petitioner's mother did not consent to the registration of the Austrian marriage. In *Lynch v. The Provisional Government of Paraguay*⁵ the court refused to recognize the retrospective effect of a Paraguayan decree confiscating a deceased man's property. Similarly, the court here could not recognize administrative action taken under the Austrian law, years after the event, as affecting the status of people who had become domiciled in this country. The petitioner was born before the Austrian marriage was registered. [Among other cases cited by counsel for the petitioner were *Swifte v. Attorney-General for Ireland*⁶; *In re Luck's Settlement Trusts*⁷; *Brook v. Brook*⁸; *Salvesen v. Administrator of Austrian Property*,⁹ and *Bank Voor Handel v. Slatford*.¹⁰]

William Latey K.C., *Crispin* and *Bramall* for Richard and the child Barbara. Although the birth certificate of the child dated June 16, 1945, purported to show that the marriage at Kitzbühl was invalid, as indeed it was when it was celebrated, the priest had issued a baptismal certificate dated June 12, 1945. As to the suggestion that the petitioner's mother was a spinster when she came to live in England, the fact was that after freely

³ [1947] P. 127, 146.

⁴ [1950] P. 71.

⁵ (1871) L.R. 2 P. & M. 268.

⁶ [1912] A.C. 276.

⁷ [1940] Ch. 864.

⁸ (1861) 9 H.L.C. 193.

⁹ [1927] A.C. 641.

¹⁰ [1951] 2 T.L.R. 755.

consenting to the religious ceremony in Austria she lived with Richard as his wife till the summer of 1947, and there was no suggestion on her part that she regarded the marriage as a nullity till June, 1949. The Austrian law No. 31 of 1945 validated the Austrian marriage retrospectively as from the date of its celebration, and the fact that the ministerial act, which devolved on the authorities and not on the parties, of registering was not performed till later did not destroy its validation. Even if it could be said to have that effect during the period before registration, this was remedied by registration in July, 1949, months before the ceremony of marriage at Croydon.

This retrospective law of 1945 was similar to many marriage validation Acts which studded the English statute book.

[BARNARD J. The Indian Divorces Validity Act, 1922, for instance, following Lord Merrivale P.'s decision in *Keyes v. Keyes*.¹¹]

There have been many other such validating statutes, and the Austrian legal experts were unanimous upon the retrospective effect of Law No. 31, once it was registered, whatever doubts they had on that point during the period before it was registered. The argument that by changing her domicile the petitioner's mother could change the married status imposed on her by the *lex loci celebrationis* could not be supported by the authorities.

[BARNARD J. If it were necessary I would hold that Richard acquired a domicile of choice in England.]

Both parties were domiciled in Poland at the time of the Austrian marriage, in the part which was formerly Austrian Poland, the courts of which (according to the expert evidence which has been given) would have recognized the validity of the religious marriage between Polish nationals, without the aid of the validating Austrian law No. 31 of 1945, so that, if the law of either party's domicile were applied, the marriage would be valid, not only as to their capacity to marry but also as to the form of ceremony. Dicey in Rule 168 (ii) said: "If the parties "enjoy the privilege of extra-territoriality and the marriage is "celebrated in accordance with any form recognized as valid by "the law of the State to which they belong, the marriage is "valid." None of the cases cited on behalf of the petitioner come near the facts in this case. Finally, if it is conceded that *locus regit actum* and the marriage in Austria was invalid, yet it was validated retrospectively and therefore the second union was

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¹¹ [1921] P. 214.

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bigamous. The petitioner must therefore be illegitimate and cannot be legitimated by the subsequent marriage of his parents.

Colin Duncan for the Attorney-General. Domicile has very little materiality in this case, but I should ask your Lordship to say that the petitioner's mother acquired a domicile of choice in England. Polish law is not applicable, because in considering the validity of the Austrian marriage one must follow the *lex loci* as to form. The expert evidence would justify a finding that the Austrian marriage was retrospectively valid, independently of the question of subsequent registration. Here were two Polish nationals, both Roman Catholics, domiciled in Poland, anxious to marry. In May, 1945, it was clear that the Austrian marriage was not valid in Austria, though the Polish courts would have regarded it as valid. Nevertheless this court would be bound to find that until the marriage was registered their unmarried status remained. Yet it would be wrong to say that Law No. 31 made no difference to their condition. If the local priest had done his duty and reported the marriage for registration, on the law being passed it would have been valid. The parties to the marriage would have themselves been powerless to turn it into a legal marriage. That duty devolved on the authorities under Law No. 31 as a ministerial act. Therefore the lack of consent by the wife to registration was irrelevant. She acquired, however, a domicile of choice here because she came to England as a spinster. But before she went through the ceremony of marriage in 1950 the Austrian marriage had undoubtedly been validated by the registration. There was nothing repugnant to English law in the retrospective law, as is illustrated by the Greek Marriages Act, 1884; also *Doe ex dem. Breakey v. Breakey*,¹² *Luna c. Godin*¹³ and *Phillips v. Eyre*.¹⁴ No change of domicile could affect the wife's status if in fact she was validly married. The principle to be followed in this respect is found in *Re Aganoor's Trusts*.¹⁵

Heathcote-Williams K.C. replied.

Cur. adv. vult.

BARNARD J., reading his judgment, said:—This is a case under the Legitimacy Act, 1926, and section 17 of the Matrimonial Causes Act, 1950, in which Krzysztof Jerzy Mieczyslaw Starkowski (otherwise Urbanski, otherwise Juszczkiewicz), an infant suing

¹² (1846) Upper Can.Rep. 2 Q.B. 349.

¹⁴ (1869) L.R. 4 Q.B. 225.

¹³ (1881) 10 Clunet 621.

¹⁵ (1895) 64 L.J.Ch. 521.

by his next friend, Henryka Antonia Starkowska, a married woman, seeks a declaration that Mieczyslaw Starkowski and Henryka Antonia Starkowska were lawfully married on February 11, 1950, at the register office in the district of Croydon in the county borough of Croydon in the county of Surrey, and that by the said marriage the petitioner became legitimated as from the date of the said marriage.

The petitioner and the parties cited in this case are all of Polish nationality and, therefore, for the sake of brevity, I propose to refer to them by their English equivalent Christian names.

Both Henrica and Richard (Ryszard Urbanski, the second party cited), were born in Cracow in Poland and lived there until the autumn of the year 1944, when they moved to Kitzbühl in Austria. At the time Henrica was pregnant by Richard, and their evidence clearly shows that they were both anxious to marry and both being of the Roman Catholic faith were anxious to be married in a church by a priest. They encountered many obstacles both from the priest and the civil registrar, but eventually, on May 19, 1945, they went through a ceremony of marriage at the parish church at Kitzbühl according to the rites of the Roman Catholic faith. I am not satisfied on the evidence that there was any insuperable difficulty to their being married before a civil registrar in accordance with the law of Austria in force at that time.

On June 12, 1945, Barbara, the third party cited, was born, and on June 16, 1945, she was registered as an illegitimate child, but on July 15, 1945, she was baptized as legitimate. Richard and Henrica lived together as man and wife until the summer of 1947, when they separated. In July, 1945, together with Barbara, they left Austria for a transit camp in Italy, and in the autumn of the year 1946 they all left Italy for England, Henrica and Barbara preceding Richard by about a month. Assuming that Henrica was a feme sole I have no doubt on the evidence before me that she then acquired an English domicile.

Either towards the end of the year 1947 or early in the year 1948 Henrica met Michael, the first party cited, and on March 27, 1949, Henrica gave birth to Christopher, the petitioner, of whom Michael was the father. On February 11, 1950, Henrica married Michael, who was then a bachelor and domiciled in England, at the register office at Croydon in Surrey.

I have heard the evidence of three expert witnesses on Austrian law, Doctors Bresch, Harpner and Abel, and it is clear from their

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evidence that on May 19, 1945, when Richard and Henrica went through the religious ceremony of marriage at Kitzbühl such ceremony did not constitute a valid marriage according to the law then in force in Austria. The German marriage law of July, 1938, was still in force, and by that law a valid marriage could only be concluded before the civil authorities. On April 27, 1945, Austria was liberated, and there was a good deal of confusion in Austria at that time as to what was the law. The Provisional Government of Austria then published an Order, No. 6, on May 1, 1945, repealing some of the German laws in force, but confirming for the time being the Marriage Act, 1938.

On June 26, 1945, the Provisional Government of Austria published a further Order, No. 31, to come into force on June 30, 1945, the relevant sections of which are as follows: [His Lordship read sections 3 (1) and (2) and 5 (1), referred to section 4, and continued:] The ceremony of marriage was eventually registered in accordance with section 5 (1) on July 18, 1949.

Counsel on behalf of Richard and Barbara argued that the marriage was a valid marriage on the day it was solemnized because at that time the parties to the ceremony were of Polish nationality, and according to the evidence of Dr. Lipnicki, an expert on Polish law, such a ceremony, even if not valid according to the law of the country where it took place, would be recognized as a valid marriage in the Austrian part of Poland, the form of such marriage being in accordance with the national law, namely, the law applicable to Austrian Poland. There can be no doubt that at that time they were also domiciled in Poland.

Dr. Lipnicki referred me to para. 7 of the Hague Convention, 1902, which was adopted as part of the law of Poland in the year 1939. Para. 7 reads as follows: "The marriage, which is not " valid as to the form in the country where it took place, could " be recognized as a valid one in other countries in the case if " the form of such a marriage was according to the national laws " of the parties entering into matrimonial vows."

So far as English law is concerned the answer to this argument is to be found in the judgment of the Privy Council delivered by Lord Dunedin in *Berthiaume v. Dastous*,¹⁶ which reads as follows: "If there is one question better settled than any other " in international law, it is that as regards marriage—putting " aside the question of capacity—locus regit actum. If a marriage " is good by the laws of the country where it is effected, it is good

¹⁶ [1930] A.C. 79, 83.

"all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage." I therefore reject this argument.

Counsel further argued that the object of Law No. 31 was to validate such a ceremony of marriage as took place in this case and that therefore the marriage became a valid marriage retrospectively as from the day of solemnization, on the passing of the Act, and that the registration of such marriage was merely a ministerial act. This may or may not have been the intention of Law No. 31, but in my view the wording of section 3 (1) is clear and unambiguous and states that such marriages shall have the effect of marriages solemnized at a register office in accordance with the Marriage Law of July 6, 1938, as from the day of solemnization, as soon as they have been registered in the Family Book kept by the registry office:—the German word for "as soon as" being "sobald."

The three Austrian lawyers agreed that this ceremony of marriage was not validated until it was subsequently registered, although they did suggest that from the date of the passing of the Act up to registration its validity was in some way suspended. I have come to the conclusion that I must construe this Act according to its language. Lord Simonds states the importance of this in his opinion in the recent case of *Magor & St. Mellons v. Newport Corporation*.¹⁷ To construe this law in any other way would necessitate altering the ordinary common-sense meaning of the words used in the section.

I now come to what I think is the real point of law to be decided in this case. On behalf of Richard and Barbara it was argued that in considering the validity of the English marriage, which took place on February 11, 1950, the court must ask itself whether at that time both parties had the capacity to marry. Bearing in mind the religious ceremony of marriage which Henrica had gone through on May 19, 1945, in Austria, was Henrica free to marry on February 11, 1950?

Counsel submits that the answer should be "No," because

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¹⁷ [1952] A.C. 189.

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the religious ceremony was made a valid marriage as from the date of the ceremony as soon as it was registered on July 18, 1949. This argument is supported by the Attorney-General. All three Austrian lawyers agree that the ceremony of marriage in Austria became a valid marriage on July 18, 1949, as from the date of solemnization.

On the other hand it was argued by counsel on behalf of the petitioner that Henrica arrived in England with the legal status of a spinster and thereafter acquired a domicile of choice in England and that any subsequent foreign law could only have territorial effect and therefore could not alter the status of a domiciled Englishwoman.

In support of this latter proposition I was referred to various authorities. In *Lynch v. The Provisional Government of Paraguay*¹⁸ it was held that the Government of Paraguay had no interest to question the will of the deceased; but Lord Penzance based his decision on the ground that succession to property in England of a deceased foreigner is regulated by the law of his place of domicile as it existed at the time of his death and therefore no changes made in that law, even though having a retrospective operation, could by the law of this country be recognized as affecting the distribution of personal property in England. The basis of Lord Penzance's decision was approved by Romer J. in *In re Aganoor's Trusts*.¹⁹

The relevant time to consider the foreign law was at the time of death, but in the present case the relevant time is when the second ceremony of marriage took place. This case would have been a strong authority for the petitioner, if the second ceremony of marriage had preceded the registration of the first ceremony of marriage.

In *Scott v. Her Majesty's Attorney-General*²⁰ the marriage was dissolved by a foreign court of competent jurisdiction, which prohibited the guilty party from re-marrying as long as the innocent party remained unmarried. The guilty party came to England with the intention of living here permanently and re-married. It was held that English law would not have regard to the personal disability imposed by the foreign law. There is no question, in the present case, of the Austrian law imposing any such penalty. The Austrian lawyers, however, had suggested that there might be a state of suspended validity, which would

¹⁸ (1871) L.R. 2 P. & M. 268.

²⁰ (1886) 11 P.D. 128.

¹⁹ (1895) 64 L.J.Ch. 521.

operate to prevent a re-marriage between the coming into force of Law No. 31 and the actual registration. I might have had to consider this proposition if the registration had been effected after February 11, 1950.

I was also referred to a more recent case of *Bank Voor Handel v. Slatford*.²¹ In that case Devlin J. was concerned with foreign legislation purporting to have effect upon property within the territory of the United Kingdom, and he held that such legislation would not be recognized by the English courts. In the course of his judgment²² Devlin J. referred to a passage in Dicey's *Conflict of Laws* (5th ed.), p. 20, on which counsel for the petitioner relies, and which reads as follows: "A State's authority, in the eyes of other States and the courts that represent them is, speaking very generally, coincident with, and limited by, its power. It is territorial. It may legislate for, and give judgments affecting, things and persons within its territory. It has no authority to legislate for, or adjudicate upon, things or persons (unless they are its subjects) not within its territory." Law 31, however, became an effective law while Richard and Henrica were still resident in Austria, and it only purported to legislate in regard to something which had taken place in Austria.

I was also referred to *In re Luck's Settlement Trusts*.²³ In that case it was held that as the father of an illegitimate child, born in California, had not acquired a domicile of choice in California at the date of the child's birth, a declaration of adoption, after he had acquired such a domicile and which in Californian law purported to legitimate the child from its birth, could not be accepted by the English courts as having rendered the child legitimate. In the course of the majority judgment of Lord Greene M.R. and Luxmoore L.J. there is this passage²⁴: "Let it also be assumed (as we conceive the law to be) that no provision of the law of a foreign country will be regarded in the English courts as effective to change the status of a person not domiciled in that country at the time—except, perhaps, in the case where the law of the country in which such person is domiciled would itself recognize the effectiveness of the foreign law in question."

In the present case the law of the foreign country was in force, although its effectiveness was delayed, before Henrica ever

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²¹ [1951] 2 T.L.R. 755.²² Ibid. 757.²³ [1940] Ch. 864.²⁴ Ibid. 873.

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acquired an English domicile and while she was still resident in Austria. Further in their judgment the following question is posed²⁵: "Will the English courts recognize the power of " Californian law retrospectively to affect the status of a person " in respect of a period when that status was subject to the law " of England and none other?" But the Lords Justices stated that they did not think it necessary or desirable to express a concluded opinion upon it. This case seems to me to be merely a refusal to accept the law of California as to legitimacy because it is in conflict with English law.

In the case before me the petitioner was born illegitimate, domiciled in England and with a potentiality of being legitimated by the subsequent marriage of his parents. But his legitimation finally depends on the subsequent marriage being a valid marriage. There is nothing repugnant to English law in retrospective legislation as such. The English legislature in 1921 passed an Act validating certain decrees granted in India for the dissolution of marriages of persons domiciled in the United Kingdom, the Indian Divorces (Validity) Act, 1921; and they passed a similar Act validating decrees granted in Kenya Colony, the Kenya Divorces (Validity) Act, 1922. I cannot think that any such persons whose divorces and subsequent remarriages occurred before the passing of such Acts could escape the effect of those Acts by a mere change of domicile.

Counsel for the Attorney-General referred me to two cases for my assistance, one a Canadian case and the other a French case.²⁶ The Canadian case was *Doe ex dem. Breakey v. Breakey*,²⁷ in which an Irish marriage was at the time of the ceremony invalid but was subsequently validated by an Imperial statute.²⁸ The Canadian court at that time, 1846, was bound by the Imperial statute and so found, but the Chief Justice, in the course of his judgment, stated²⁹: "Now, if none of the exceptions in the statute prevent its applying for the purposes of this " action, and if the marriage were by that act made valid in " Ireland merely, it follows that we must treat it here as having " been a valid marriage at the time it was solemnized; for it is " the *lex loci* that must govern. But this Imperial statute, " which we are bound judicially to notice, and which binds us as " well as the courts in England, does, by its direct operation,

²⁵ [1940] Ch. 864, 874.²⁸ 5 & 6 Vict. c. 113.²⁶ *Luna c. Godin* (1881) 10 Chnet 621.²⁹ Upper Can.Rep., 2 Q.B. 349, 357.²⁷ (1846) Upper Can.Rep. 2 Q.B. 349.

"place it on the footing of a legal marriage here, as much as
 "if it had been solemnized by a clergyman of the Church of
 "England." I gather that the Chief Justice is saying that at
 whatever time you have to consider the validity of a ceremony
 of marriage that is the time to ascertain the *lex loci celebrationis*.

In the French case ³⁰ the French courts had to consider the
 validity of a ceremony of marriage performed according to the
 Roman Catholic rites in Mexico; at the time of the ceremony
 such a marriage was invalid according to the law of Mexico.
 Subsequent to the ceremony and after the parties to it, who were
 French, had returned to France a law was passed in Mexico
 validating such marriages retrospectively as from the date of
 celebration. The French court held the marriage to be valid.

The parties in this case have been the unfortunate victims of
 circumstances, and no blame attaches to any of them. Before
 the petitioner's mother went through the ceremony of marriage
 with Starkowski at the register office at Croydon she not only
 disclosed the fact of her former marriage to the registrar but
 inquired of the registrar at Kitzbühl in Austria whether her former
 marriage was valid or not and received a reply dated June 30,
 1949, to the effect that she was not married at all in Kitzbühl.
 It was argued on her behalf that she did not consent to the
 registration of her former marriage. This seems to me to be
 beside the point, for there can be no question that at the time she
 and Urbanski went through the ceremony of marriage on May 19,
 1945, they both wanted to get married and were consenting
 parties to the marriage. Moreover, Law No. 31 merely validated
 what they had done and the date of registration of their marriage
 was a duty imposed upon officials and something outside their
 control.

I have come to the conclusion that I must ask myself one
 simple question: Were both parties free to marry on February 11,
 1950? The answer to that question is "No," because at that
 time Henrica was a married woman. She had gone through a
 ceremony of marriage with another man, who was still alive, and
 according to the *lex loci celebrationis* that was a valid marriage.
 The validation of marriage has frequently been enacted in
 England by statute, and marriage ceremonies are clearly within
 the power of Austria to validate, and the effectiveness of Austrian
 laws so validating a ceremony must be recognized by the comity
 of nations and by English law.

³⁰ *Luna c. Godin* (1881) 10 Clunet 621.

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I therefore declare that the marriage celebrated between Urbanski and the petitioner's mother on February 11, 1950, at the Register Office, Croydon, in the County of Surrey, is invalid and that the petitioner is, therefore illegitimate.

Declaration accordingly.

Solicitors: *George & George; The Treasury Solicitor; Culross & Trelawny.*

J. B. G.

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 Mar. 3.

HAMAR v. CUNARD WHITE STAR LD.
 THE QUEEN MARY.

Lord Merri-
 man F.

Practice and Procedure—Admiralty—Fatal Accidents Acts—Award to widow of deceased seaman—Remarriage of widow before date of award—Costs not subject to mandatory taxation—R.S.C., Ord. 22, r. 14 (9), (11).

Where the widow of a deceased seaman, who was the sole beneficiary of his estate, was awarded a sum of money under the Fatal Accidents Acts, 1846–1908, and under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the loss of her husband, remarried after the date of the issue of the writ in the action claiming damages, but before the date of the award, the provisions of sub-r. 11 of R.S.C., Ord. 22, r. 14, did not apply.

SUMMONS adjourned into court for judgment.

By a writ dated January 20, 1950, Mrs. Hamar claimed, as administratrix, damages from the Cunard White Star Ltd., under the Fatal Accidents Acts, 1846–1908, and under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her husband, who lost his life when, in 1942, *H.M.S. Curacoa*, on which the deceased was serving as a seaman, collided with the Cunard liner *Queen Mary*. The defendants admitted liability, and the registrar assessed the plaintiff's claim at £500 under the Law Reform (Miscellaneous Provisions) Act, 1934, and £628 under the Fatal Accidents Acts, 1846–1908. On December 11, 1951, the registrar made his report. On March 25, 1950, the widow remarried. Both parties accepted the registrar's report, but the defendants' solicitors objected to the inclusion of a term in the draft consent submitted by the plaintiff's solicitors to them

for their approval, namely, "that the costs of the action should be taxed in accordance with the provisions of R.S.C., Ord. 22, "r. 14 (11).¹"

The summons was referred to the President for his decision.

J. Harcourt Barrington for the plaintiff.

S. O. Olson for the defendants.

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LORD MERRIMAN P. This is a summons which was referred to me by the registrar because it was thought to raise a question of principle which may affect other similar cases. It is one of the claims arising out of the collision between the *Queen Mary* and H.M.S. *Curacoa*, and it was brought by the plaintiff as administratrix of the estate of her deceased husband. The claim was under two heads: (1) For damages under Lord Campbell's Act (the Fatal Accidents Act, 1846), and (2) under the Law Reform (Miscellaneous Provisions) Act, 1934. It is important to notice that the sole beneficiary is the plaintiff herself. Therefore, I have not to consider a case in which the plaintiff sues on behalf of other dependants under Lord Campbell's Act, still less with a case in which any dependant is an infant.

The writ in the action is dated January 20, 1950, but on March 25 of that year the plaintiff widow remarried, and at the time she remarried there had been no reference to the registrar about the amount of her claim, which as a claim was not disputed; still less had there been any order for costs.

By R.S.C., Ord. 22, r. 14 (9), which is one of the paragraphs dealing with infants and persons under a disability, it is provided as follows: [the President then read paragraph 9 of the rule, and continued:] The latter part of that rule does not arise because

¹ Ord. 22, r. 14 (1): "In any cause or matter . . . in any Admiralty action . . . in which money or damages is or are claimed by or on behalf of an infant, . . . no settlement or compromise or payment or acceptance of money paid into court, whether before or at or after the trial, shall as regards the claims of any such infant . . . be valid without the approval of the court or a judge."

Sub-r. (9): "The provisions of this rule shall also apply to all actions in which damages are claimed or

"recovered by or on behalf of or adjudged or ordered or awarded or agreed to be paid to an infant . . . under the Fatal Accidents Acts, 1846-1908, and also to money which under those Acts is recovered by or adjudged to be paid to the widow of the person killed as they apply to money recovered by or adjudged or ordered to be paid to an infant."

Sub-r. (11): "The costs of the plaintiff . . . in any such cause or matter or incident to the claims therein or consequent thereon shall be taxed by the taxing master. . . ."

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there is no person interested in the amount other than the plaintiff herself. I was assured that it was impossible to distinguish in any way the costs incurred in this matter as between the claim under Lord Campbell's Act and under the Law Reform (Miscellaneous Provisions) Act, 1934, and I can well understand that this must be so. But, so far as the Law Reform damages are concerned, sub-rule (9) does not apply at all.

On December 11, 1951, the registrar made his report on the claim and he awarded under the Law Reform Act the sum of £500, under the Fatal Accidents Acts the sum of £628, and £20 in respect of special damages. On that award this summons came before me asking that the sum of £520 be paid to the solicitors acting for the plaintiff; that the sum of £628 be paid into court; and that the plaintiff's costs be taxed in accordance with R.S.C., Ord. 22, r. 14 (11). I need not, I think, read sub-rule (11). Suffice it to say that there is abundant authority that, if the rule applies at all, taxation of costs is mandatory. If the plaintiff is not subject to the rule, she can, as can any other plaintiff *sui juris*, make any arrangement she likes about costs incurred in her claim under the Fatal Accidents Acts.

On that summons being served on the defendants' solicitors, they took exception to the paragraph about taxation, and struck it out. The plaintiff's solicitors reinstated it, and so the matter arose. The question is whether the sub-rules (9) and (11) of Ord. 22, r. 14, apply at all at this stage when, though the plaintiff was a widow when the action started, she had ceased to be a widow at the relevant time.

There is no direct authority, but there is a very strong indication of the way in which this question ought to be decided, in a decision of the Court of Appeal in *In re Embleton*,² where Morton L.J. said³: "There is one possible distinction between "the present case and *Johnston v. Henry Liston & Co.*⁴ In "subsection (3) of section 164" (the County Courts Act, 1934), "the provisions of the section are applied to money 'adjudged "or ordered to be paid to the widow of the person killed.' Now "the widow of a person killed would not be a person under any "legal disability and, therefore, the passage from Warrington "L.J.'s judgment which I have already read would not apply "verbatim to the case of a widow, but I think it would be drawing "far too fine a distinction to say that the present case can be

² [1947] K.B. 142.

⁴ [1920] 1 K.B. 99, 103.

³ *Ibid.* 146.

“ distinguished from *Johnston v. Henry Liston & Co.*⁴ on that
 “ ground. I think the application of Warrington L.J.’s reasoning
 “ to the case of a widow would be this: ‘ the words for the benefit
 “ ‘ of the person to whom the order relates ’ seem to me to mean
 “ for the benefit of a person already described—namely, a person
 “ who is the widow of the person killed, and when the person in
 “ question ceases to answer that description the discretion ceases
 “ also. Thus, if the widow remarried, she would be entitled to
 “ have the money paid out to her. That case is not before us but
 “ it seems to me that this result must logically follow.”

It is, of course, true that the observations of Morton L.J. are
 obiter as regards the present case, but they form so integral a
 part of the reasoning on which that case was decided that I would
 long hesitate before dissenting, even if I disagreed with them.
 I accept them gladly.

I think that the defendants are right in this case, and that it
 is not necessary, in the circumstances, for the ex-widow to tax
 her costs which only accrue under an order made some 18 months
 or more after she ceased to be a widow. I therefore accept the
 contention of the defendants that the paragraph relating to the
 taxation of costs must be struck out.

Though the question is not strictly before me, if I am asked
 (as I understand that I am) to say what my opinion is, I would
 say that this decision equally applies to the question of that part
 of the damages awarded to the plaintiff to be paid into court.
 In my opinion the court has no discretion to control the money
 awarded to the plaintiff in circumstances such as these.

The order, therefore, will be that paragraphs 2 and 3 of the
 summons will be read together, so that all the money awarded
 to the plaintiff by the registrar will be payable to the plaintiff’s
 solicitors on their receiving authority from her, and that the
 paragraph relating to the mandatory taxation will be struck out.

Judgment for the defendants.

Solicitors: *Clyde & Co.; Hill, Dickinson & Co.*

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⁴ [1920] 1 K.B. 99, 103.

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Mar. 11, 12.

Evershed M.R.,
Jenkins and
Hodson L.JJ.*Divorce—Nullity—Incapacity of wife—Child adopted—Approbation of marriage—Public policy.*

A husband and wife were married in 1941. The marriage was not consummated owing to the incapacity of the wife. In 1943 she had an operation with a view to overcoming her physical incapacity. Thereafter, as the commissioner found, the marriage was never consummated. In 1944 the husband and wife adopted a child under the Adoption of Children Act, 1926, and in 1945, that child having died, they adopted under the same Act a second child at the instance of the husband. The husband left the wife in 1946 and did not return to her. The husband wrote a number of letters to the wife in which he complained of her conduct in certain respects, but he never complained of, or referred to, the non-consummation of the marriage. In October, 1950, he presented this petition to have his marriage annulled. Commissioner Grazebrook Q.C. made a decree of nullity. On appeal:—

Held, that in all cases where one of the parties to a marriage sought to have it dissolved on the ground of non-consummation the question was whether the husband or wife (as the case might be) by conduct or overt acts had approbated the existence and validity of the marriage so as to make it inequitable (that was unjust as between the two parties to the suit) and also contrary to public policy to make a decree of nullity. The question whether a party to a marriage which had not been consummated had approbated the marriage could not be judged by reference to any intention he might have had which remained locked in his own bosom. That party's acts must be judged by reference to their own nature and by reference to his declared intentions at the material time. The formal adoption by the husband jointly with his wife of a child under the Adoption of Children Act, 1926, together with the other circumstances, amounted to such an affirmation by him of the existence and validity of the marriage as to make it inequitable and contrary to public policy that he should be granted a decree of nullity.

The principle enunciated by Lord Selborne L.C. and Lord Watson in *G. v. M.* (1885) 10 App.Cas. 171, 186, 197 considered and applied.

R. E. L. (otherwise R.) v. E. L. [1949] P. 211 considered and distinguished.

APPEAL from Commissioner Grazebrook Q.C.

The husband and wife were married on January 1, 1941. It appeared that at the time of the marriage both spouses were at least aware that the wife would probably not be able, in her then physical condition, to bear children. It was a question which

was in issue between them whether she had also said to her husband that there would be difficulty on her part in consummating the marriage.

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The first period of the marriage lasted from its celebration in January, 1941, until the autumn of 1943. The attempts that were made prior to the autumn of 1943 to consummate the marriage admittedly were not successful. In that month the wife underwent an operation intended to make consummation easier.

The first issue between the husband and wife was that the wife alleged that the marriage was consummated on November 3, 1943, shortly after her return from hospital, and that sexual intercourse took place at times, though infrequently, thereafter. The husband's evidence, which was preferred by the commissioner, who saw both spouses, was that neither on that occasion in November, 1943, nor at any later time was the marriage ever consummated.

In 1943 the husband, who was a meteorologist by profession, was in the Royal Air Force, and he and the wife had lived together at various places during his service. At the end of the year 1944 the wife came into some money and purchased a bungalow at Carbis Bay, near St. Ives in Cornwall, which thenceforth was the matrimonial home. The wife moved there immediately, and the husband went into the officers' quarters at the station where he was serving, joining the wife at St. Ives on his leaves.

In June, 1944, six months or more after the wife had had her operation, the husband and wife adopted a boy, David, pursuant to the Adoption of Children Act, 1926. That child died and it was plain from the evidence that the wife reproached herself seriously for the child's death and felt that she had in some way shown ineptitude in looking after it.

In April, 1945, while the wife was at Carbis Bay in Cornwall and the husband in the Royal Air Force, a suggestion was made by the husband (and there was no doubt that it was at his instigation and initiative that this step was taken) for the adoption of a second child pursuant to the Act of 1926. The evidence of the husband upon this matter consisted, first, of a letter written shortly before the child was adopted, and, secondly, of his evidence at the hearing.

In his letter of February 21, 1945, after referring to the death of David, the husband wrote: "If any blame attaches to you, it is in your own imagination only, that frightfully vivid imagination which results when you mix the gael and the celt. There

C. A. "is nothing whatever to blame yourself for, so stop it. I know
1952 "you're afraid of having another child. That's one of the reasons
W. v. W. "why I'm anxious for you to have one, because only by so doing
 "will you get over that fear, and also a lurking fear every time
 "you hold someone else's baby. I care for you too much to
 "want to see you living for the rest of your life in terror."

The husband's evidence-in-chief was to the same effect. At the end of the examination-in-chief he said: "My wife said something about it and then gave me to understand that in view of the way in which the earlier child had died she was very nervous of adopting another one, and I tried to reassure her"; and then eventually he said that the reason for the adoption was "to make my wife more confident." In cross-examination he said: "I wanted to adopt a child because, as I think you have probably gathered from the tone of this letter, I was under the impression that my wife was extremely nervous about having a child, and I thought that adopting a child would give her a chance to recover her confidence and in time we could try to have a child of our own."

On April 11, 1945, a baby boy, John, was formally adopted by the husband and wife under the Adoption of Children Act, 1926. Early in 1946 the husband, having left the Royal Air Force, joined his wife in the Carbis Bay bungalow and he obtained civilian employment locally. The cohabitation in Cornwall was not happy and the husband left Carbis Bay on November 26, 1946, and never returned. He then joined the Royal Navy and was stationed at various places in the British Isles.

Four years elapsed after the husband left Carbis Bay and before he filed his petition to have his marriage annulled. During this period a number of letters passed between the husband and wife in which she asked him to go back to her and he required her first to join him in married quarters where he was stationed. In the course of his correspondence the husband set out carefully and, on the face of it, exhaustively, the reasons which he gave for the unhappy outcome of the marriage. In these letters there was a full statement of reasons affirmatively given for the breakdown of the marriage, but negatively there was nowhere in this or in any other correspondence any hint whatever that the alleged non-consummation operated at all on the husband's mind, either as a reason for the breakdown of the marriage or as affecting his judgment and his decisions in any other respect.

The husband wrote in a letter of August, 1947, to his wife: "Helen Dear, Thank you for your olive branch," and then, after stating what he has felt to be the reasons for the unhappy marriage, and why, he said: "If you can conquer your jealousy of and hostility towards my relatives and friends, and your terrific temper, then our marriage stands a chance of survival. If you cannot overcome all these things, then I am afraid that whatever I do our marriage will be a failure, for it is these things which stand in the way of its success."

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In October, 1950, the husband petitioned for a decree of nullity. The wife prayed for dissolution of the marriage on the ground of the husband's desertion. The commissioner, who preferred the husband's evidence, made a decree nisi for nullity. The wife appealed.

Geoffrey Lawrence Q.C. and *Fairweather* for the wife. It is submitted first, that the commissioner should have accepted the wife's evidence and found that the marriage had been consummated. If that is wrong, it is submitted that a decree of nullity should not have been pronounced because the husband has by his conduct approbated the marriage. The principle enunciated by Lord Selborne L.C. in *G. v. M.*¹ applies here, and it would be inequitable and against public policy to allow the husband to say now that this marriage is no marriage. There is no ground for cutting down the application of the principle in *G. v. M.*¹ as was suggested in *Clifford v. Clifford*.² The adoption of a child in 1945, four years after the marriage and after the wife had had the unsuccessful operation, was an approbation of the marriage by the husband with full knowledge of the facts. There is no evidence that he did not know his legal rights. The husband could have held his rights in suspense, but by adopting a child he elected to affirm the marriage, and he cannot now question its validity. The husband's letters and correspondence show that he never expressed any dissatisfaction with the character of this marriage until he started these proceedings. This case is distinguishable from *R. E. L. (otherwise R.) v. E. L.*³ There the wife throughout stated her dissatisfaction with the position and all she did was with a view to establishing normal married relations.

The test is whether a complaining spouse has done some act which recognizes the existence of a valid marriage and which

¹ (1885) 10 App.Cas. 171.

³ [1949] P. 211.

² [1948] P. 187.

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would make it inequitable and contrary to public policy for him to challenge its validity. Here the adoption in 1945 was a representation that the marriage was valid. Under the Adoption Act, 1926, the Act then in operation, a joint adoption was only permitted in the case of husband and wife. The adoption affected the rights of third parties, namely, those of the child and its mother. It is difficult to imagine any other act which would be a greater affirmation of the marriage.

H. G. Garland for the husband. It is submitted that the adoption of a child cannot of itself amount to approbation of a marriage. In this case the husband still hoped in 1945 that it would be possible to consummate the marriage. The adopted child is in no worse a position than was the child in *R. E. L. (otherwise R.) v. E. L.*⁴ That there may be such approbation of a marriage as will prevent nullity proceedings, there must be an intention to approbate. The adoption of a child where there is no such intention and the parties have not given up the hope of normal married life is not approbation within the principle of *G. v. M.*⁵ There has been no case since 1886 in which the court has found that a complaining spouse has approbated a marriage. [He referred to *Dredge v. Dredge*.⁶]

EVERSHED M.R. The question which we have to decide is whether in the present case, assuming in the husband's favour that he can establish and has established incapacity on the part of the wife, or its equivalent, he by his conduct has so approbated the marriage that on grounds of equity or public policy, or both, this court ought not now to entertain his petition.

The marriage took place in the month of January, 1941, and the petition was not presented for close on 10 years after the marriage. The delay of itself cannot amount to approbation. Indeed, in one of the cases to which we have been referred in this court, *Clifford v. Clifford*,⁷ the view was expressly affirmed that it could not; but it is, nevertheless, a significant fact.

[His Lordship reviewed the evidence set out above and held that the commissioner's finding that the marriage had not been consummated owing to the incapacity of the wife could not be impeached, and continued:] The principle or rule of law (if it may be so called) that in certain circumstances a spouse is disabled or barred from proceeding to avoid a marriage on the ground

⁴ [1949] P. 211.

⁵ 10 App.Cas. 171.

⁶ [1947] W.N. 71.

⁷ [1948] P. 187.

of his wife's incapacity or wilful refusal to consummate was established by the House of Lords in the Scottish case of *G. v. M.*⁸ That there were previous cases in which a petitioner had been so disentitled appears from the argument in that case. Reference has been made to the case of *Guest v. Shipley* (*otherwise Guest*)⁹ as an example. The suggestion was made in the case of *G. v. M.*⁸ that the question turned on what had come to be called "sincerity." The word was derived from a judgment of Lord Stowell's in *Briggs v. Morgan*,¹⁰ and it had been thought, or it was argued, that in order to obtain a decree there must be no other motive on the part of the petitioner than a desire to obtain redress for a grievance really entertained, and that, if it could be said that the real reason why a husband wanted to have the marriage avoided was that he would by that means no longer have to make financial provision for his wife, the existence of that mercenary motive in his mind meant that there was a fatal absence of "sincerity" in his petition. The House on that occasion disposed of that argument, and in doing so stated what was the real principle of approbation. The classic expression of that principle is found in the speech of Lord Selborne L.C., and again in the speeches of Lord Watson and Lord Bramwell in *G. v. M.*⁸ In *Clifford v. Clifford*¹¹ Tucker L.J., delivering the first judgment of this court, set out the relevant passages in Lord Selborne L.C.'s speech and also in the speeches of Lord Bramwell and Lord Watson. I refer first to the words from Lord Selborne L.C.'s speech¹²: "I think I can perceive that the real basis of reasoning which underlies that phraseology is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of."

And the matter was put thus by Lord Watson in a phrase which Mr. Lawrence adopted for the purposes of his argument¹³: "There may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should

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⁸ 10 App.Cas. 171.⁹ (1820) 2 Hagg.Con. 321.¹⁰ (1820) 2 Hagg.Con. 324, 330.¹¹ [1948] P. 187.¹² 10 App.Cas. 171, 186.¹³ Ibid. 197, 198.

C. A. "be permitted to go on to challenge it with effect." Has there,
1952 then, been conduct here on the part of the husband of such a
W. v. W. character that the court must say he has approbated the marriage,
Evershed M.R. that he has affirmed the existence and the validity of the marriage
so that it is inequitable and (if it be necessary to have both conditions, though I do not so decide) also contrary to public policy that his petition should be granted?

I have come to the conclusion that in this case an affirmative answer must be given to that question: and I first attach very great weight to this adoption in 1945. A proceeding to adopt a child under the Adoption of Children Act, 1926 (then in force), involves certain propositions, and certain consequences. It involves this: that where two persons jointly adopt they must proceed on the footing that they are spouses, that they are a married couple; indeed, where a person claiming to be a married man or woman applies for an order for adoption under the Act, then, if he or she has a spouse, that spouse must consent. The Act further provides that the rights of the natural parent or parents as regards the child shall be displaced, and that the adopted child shall stand in relation to the adopters (if there be two) as if the latter had been the lawful father and mother of the child. Finally, it is provided that certain steps shall be then taken, by reference to a special register, for putting upon the register the fact that this child is now to be treated pursuant to the Act as though it were the child of the adopting spouses. That was done in this case. The order made in April, 1945, on the joint application of the husband and wife, describes the spouses as husband and wife, jointly applying (as they could only do if they were husband and wife) to adopt a certain child, John, being the child of a named woman. The consent of that woman had either been obtained or dispensed with, according to the recitals. It was ordered that the applicants were authorized to adopt the infant and it was directed that the Registrar-General should make an entry recording this adoption in the Adopted Children Register in accordance with the particulars set out in the schedule; and the particulars, in the schedule, state what is the name of the adopted child (its Christian names only being given); the name, surname, and address of the adopters is given, namely, that of the husband and wife, and the date of birth and of the adoption.

That step seems to me to be a very important and significant step, affecting, as it does, not only the two persons who are the applicants, but the child who was adopted and the mother of the

child whose rights were displaced. The application was made on the footing that both applicants were parties to a valid marriage. I put to Mr. Garland, in the course of the argument, this extreme case: Supposing, in 1946, the husband after admittedly, according to his own story, he had given up all hope of consummation of the marriage, had then written to his wife and said: "A full marriage, a normal marriage, is impossible; we have to make the best of it, and in the circumstances it would be a help to us both to adopt a child and let us then do so"; and then that they had adopted this child. In such circumstances, I think it would be impossible to say that the act of the husband in initiating the application and in making it was not such an affirmation by him of the existence and validity of the marriage as would make it most inequitable and certainly contrary to public policy to permit him to turn round afterwards and say: "Well, there never was any valid marriage at all. The whole basis on which I and my supposed wife made the application was non-existent and I ask to have the marriage avoided."

There is this difference in the present case: according to the evidence of the husband (which the judge accepted) at the time of the adoption the husband was at any rate still in the hope (and he was inspired by that hope in making the application), that the marriage would be eventually consummated; and he says indeed (though for my part I cannot help feeling doubt about this) that in the back of his mind when this second adoption was put forward by him was the hope that it would itself be a step towards achieving what he ultimately hoped would be achieved, namely, a physically normal marriage. That, I think, differentiates the case from the one I have stated by way of supposition. Still, this was the second adoption. An earlier adoption had been made in 1944, that is to say, after (according to the husband) the operation which the wife had undergone had not proved effective. After the adoption the husband, by his later correspondence, never put into words the hope which he expressed in evidence and never did other than assert that the marriage was subsisting and valid, and he went on doing so at a time when apparently the hope of a normal marriage, if it remained at all, must have been of a very remote character.

Taking all those things together—and I am not saying that the one act of adoption in 1945, highly significant though it be, would necessarily have sufficed for it is unnecessary for me to do so—I feel impelled to hold (contrary, in this respect, to the view

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of the commissioner, who said there was no evidence to that effect) that the husband has so approbated the marriage as to render it inequitable and also contrary to public policy for him now to assert and rely upon its voidability.

Our attention was directed to a case which came, in 1949, before Pearce J., the case of *R. E. L. (otherwise R.) v. E. L.*¹⁴ That was a remarkable case, in which the petitioner was the wife and the incapacity was upon the husband's side. It appeared that the husband had taken steps, by consulting a doctor, to try to improve his performance, but without success. It also appeared that the wife had been artificially inseminated from her husband's seed, and at the time she presented her petition, though she did not then know it, she was pregnant as a result of the insemination. Briefly, the argument for the husband was that the act, plus the consequence of the artificial insemination, amounted to such approbation of the marriage on the wife's part that it would be wrong and unconscionable and against public policy for her now to be heard to say that the marriage should be avoided. The judge referred to the classic utterances of Lord Selborne L.C. and Lord Watson in *G. v. M.*,¹⁵ and to certain other decisions—for example, the case of *Dredge v. Dredge*¹⁶—and put the matter to himself in this form¹⁷: “Her letters and “her evidence show that she never intended to approbate an “abnormal marriage.” The reference to the letters is this (and it is a feature distinguishing that case very strikingly from the present), that throughout the distressing period when the husband and wife were trying to get over this overwhelming difficulty, the wife had written making it plain beyond a peradventure that, for her, normal consummation, normal sexual intercourse, was an essential condition to the marriage. “The only security for “marriage,” she said, “is the reality of marriage; this must “be striven for at any price”; and that point of view was expressed with equal clarity throughout, during and after this period of her artificial insemination.

How different is that from the present case where, whatever may have been in the back of the husband's mind, there is according to the evidence (and particularly the letters) no hint on his part of his having taken that view, still less of his having expressed it to the wife or anyone else; and I add that on any view of it the sexual side of the marriage was obviously far less

¹⁴ [1949] P. 211.

¹⁵ 10 App.Cas. 171.

¹⁶ [1947] W.N. 71.

¹⁷ [1949] P. 211, 218.

important to this husband than it is to some. In the case before Pearce J. there was, concurrently with the wife's act in submitting to or acquiescing in artificial insemination, other conduct on her part, namely, the consistent and clear expression to her husband of her insistence on normal physical relations which must obviously have for him affected and qualified the nature of, and the true interpretation to be given to, the act and consequence of the artificial insemination, relied upon as constituting approbation. Nevertheless, I am not, for myself, satisfied of the correctness of the formula which I have read from Pearce J.'s judgment. It is not, in my judgment, a question of "intending "to approbate an abnormal marriage," if by that language it is meant that the question is whether (whatever may have been the conduct, the "overt acts," on the part of the complaining spouse) he or she intended (subjectively) to affirm or acquiesce in an abnormal marriage. The question in my view in this case, as in all such cases, is: Has the husband or wife (as the case may be) by conduct or overt acts consistent only with such affirmation approbated the existence and validity of the particular marriage, whatever may be its particular attributes?

I must not be taken to be saying that, on its particular facts, the case of *R. E. L. (otherwise R.) v. E. L.*¹⁷ was not correctly decided. It is unnecessary for me to express any opinion on that matter. Nor is it necessary for me to express any view on the question whether submission to or acquiescence in artificial insemination of a wife from the seed of a husband, without more, necessarily amounts to such an approbation of the marriage between them by either spouse as to constitute a bar to later proceedings by him or her for nullity on the ground of the other's incapacity or wilful refusal; or upon the further question whether, if the answer to the preceding question be in the affirmative, the complaining spouse can nevertheless, by the clear expression to the other of the necessary reservation on his or her part, protect himself or herself from the consequences that otherwise would flow from the act of artificial insemination, making it, as it were, an act on his or her part "without prejudice" to his or her other rights. But in the present case, where, as I have said, there was no such expressed reservation on the husband's part, his conduct seems to me to have been consistent, and only consistent, with an approbation of the marriage by him of the most unequivocal character.

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The case of *Dredge v. Dredge*¹⁸ I mention because it was referred to by Mr. Garland. That was a case in which the effect under the then legislation of a decree of nullity was to bastardize a child which had been conceived before the marriage. No question of that sort arises here, of course, but Mr. Garland used it to show that the effect on the child of the two persons in question was at any rate not necessarily any bar to the granting of a decree of nullity, if the grounds for such were shown; and with that I agree. This case is different from *R. E. L. (otherwise R.) v. E. L.*,¹⁹ and it is certainly different from *Dredge v. Dredge*.¹⁸ For the circumstance that the statutory provisions of the Adoption of Children Act, 1926, have their effect upon persons otherwise wholly unconnected with the marriage is, I think, a very important and significant circumstance.

There only remains this to be said. According to the formula which I have read from Lord Selborne L.C.'s speech in *G. v. M.*²⁰ it is necessary that the complaining spouse, who is said to have approbated or affirmed the marriage, should at any rate have known the facts and what his legal position was as a result of them. It is said by Mr. Garland that at the time when the adoption took place it was still not known as a certainty to the husband (according to his evidence) that the wife was incapable of consummation. I will assume that at that time there still lingered hope in his breast—though it must in all conscience have been declining in strength. But it is not the adoption only; it is the adoption in the light of that which preceded and followed it that I think constituted affirmation. Certainly not long after it had become plain to the husband, or must have become plain to the husband, that normal marital relations were impossible; and certainly the fact of their being difficult, if not impossible, as I have already said, never played any part whatever in anything the husband said in correspondence or otherwise as influencing his conduct. As regards his legal rights, there is no evidence before the court that he was unaware of what rights he would have if his wife was incapable of consummating the marriage; and, at least in the absence of any such evidence, it cannot in my judgment be assumed in his favour that he was ignorant of what the consequences would be if he could prove such incapacity.

¹⁸ [1947] W.N. 71.

¹⁹ [1949] P. 211.

²⁰ 10 App.Cas. 171, 186.

In all the circumstances and upon the facts of this case (and I need hardly say that every case of this kind, as every other case, must depend on its own special and particular facts), I think the formula in Lord Selborne L.C.'s speech in *G. v. M.*²⁰ has been satisfied and that the conduct of the husband, taken over the whole period, was consistent and consistent only with such affirmation of the marriage as now to make it inequitable (that is, unjust as between the two parties to the suit) and also contrary to public policy for this court to grant his prayer. The consequence will be that the judgment ought to be reversed and we must send the matter back to the court below in order that the question of dissolution of the marriage on the ground of desertion may be pursued, if the wife desires to pursue it; and it may be necessary for leave to be given for the husband to amend his proceedings. Those are matters which the judge will deal with. We cannot at present go into them.

I think that this judgment should be reversed and that the decree nisi for nullity should be set aside.

JENKINS L.J. I agree. Mr. Lawrence has endeavoured to persuade us that as regards the issue of fact, that is to say, the question whether this marriage was ever in fact consummated, we should reverse the finding of the commissioner to the effect that it never was consummated. For that purpose he relied chiefly on the letters to which we have been referred. I confess that I feel the force of the argument founded upon those letters, some of which, at all events, are not letters one would have expected to have been written by a husband who was labouring under a grievance as to the non-consummation of his marriage through the fault or incapacity of his wife. But the commissioner had these letters before him; they were put to the husband in the course of his evidence; and the commissioner, having heard and seen both the husband and the wife in the witness box, formed a decided preference for the evidence of the husband as compared with that of the wife.

It is, of course, well settled that decisions of judges of first instance based upon the view they form as to the relative credibility of the witnesses who have given evidence before them are not lightly to be interfered with in this court; and after giving the present case the best consideration I can, I find myself unable to regard it as one in which the commissioner's decision on this issue of fact should be disturbed.

²⁰ 10 App.Cas. 171, 186.

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As to the issue of approbation, the wife pleaded that the husband approbated the marriage by adopting, jointly with the wife, a boy born on November 14, 1944, under an adoption order dated April 11, 1945. The question is whether that adoption, and the part the husband took in bringing it about, amounted to an approbation of the marriage so as to prevent him now from relying upon its non-consummation. The answer to that question depends on the application to the facts of this case of the principle stated in the House of Lords in the case of *G. v. M.*²¹ I have no desire to multiply citations, but I may perhaps be forgiven for referring again to the passage in the speech of Lord Watson in which the principle is succinctly stated. He said²²: "I think "that when those cases are dissected they do show the existence "of this rule in the law of England, that in a suit for nullity of "marriage there may be facts and circumstances proved which "so plainly imply, on the part of the complaining spouse, a "recognition of the existence and validity of the marriage, as to "render it most inequitable and contrary to public policy that "he or she should be permitted to go on to challenge it with "effect."

Now, are the facts and circumstances proved concerning the adoption in this case facts and circumstances which so plainly imply on the part of the husband a recognition of the existence and validity of the marriage as to render it most inequitable and contrary to public policy that he should now be permitted to challenge it? In my view that question admits of only one answer. The adoption of a child under the Adoption of Children Act, 1926 (which was the relevant statute at the material time in the present case), is a solemn act which involves a representation to the court in the case of joint adopters that the joint adopters are husband and wife. On that representation, and upon proper evidence as to the means, respectability, and responsibility, of the spouses, and the stability of their home, the court will make an order which transfers the adopted child from the legal protection of its natural parents or parent to the legal protection of its statutory parents, as the adopters, by force of the order, in effect become. There is a representation by them to the court expressly of the existence, and (as I think) impliedly of the validity, of the marriage, and acting on that representation the court makes an order which irretrievably alters the status of the adopted child. More than that, the rights of the natural

²¹ 10 App.Cas. 171.²² Ibid. 197.

parents or parent of the adopted child are by force of the order put an end to; and the consent of the natural parents or parent is in ordinary circumstances a necessary preliminary to the order. Thus the third parties affected by the order include, in addition to the child itself, its natural parents or parent, who, on the footing that the application for adoption is being made by a married couple, will in general have agreed to resign, and in any case will by virtue of the order have been caused to resign, to that married couple all parental rights and duties with regard to the child. It seems to me difficult to imagine any act by two spouses which could more clearly affirm the existence and validity of their marriage. Unless, therefore, it can be said here that what was done as regards the adoption of this child was done, so far as the husband was concerned, without adequate knowledge of the facts and of the law (which is one of the conditions of approbation stated by Lord Selborne L.C. in *G. v. M.*²³) it seems to me to be plain in the result that he must be taken to have approbated the marriage. A knowledge of the law must, as it seems to me, be imputed to him in the absence of evidence that he was ignorant of it. As regards knowledge of the facts, he knew full well of the difficulty there was as to intercourse with his wife, and he knew full well at the time of the adoption—that is, in April, 1945—that the operation from which an improvement had been hoped, which had taken place some 18 months previously, had failed to produce the desired result.

Mr. Garland, for the husband, argued that the marriage was even then in what might be called a probationary or trial stage. The husband, he suggests, was still hoping to make it a normal marriage and prevailed upon the wife to agree to and to concur with him in carrying out the adoption in the hope that this end might be achieved. I need not pause to consider what effect, if any, a private understanding of this nature between the adopting spouses might, if proved, have had on the result; for there is nothing, so far as I can see, in the contemporary correspondence which suggests that the husband initiated this project of adoption with any such object in view. To judge by the letter of February 21, 1945, his reason for recommending an adoption was simply to help his wife get over her grief and feelings of anxiety in regard to the unfortunate death of the previously adopted child. There was certainly no suggestion at all, so far as I can tell from the correspondence, by the husband

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²³ 10 App.Cas. 171.

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to the wife that the adoption was being proposed by him on any other footing but that this was a valid and subsisting marriage. He never suggested to her at all, so far as I can see, that this was an experiment which he was initiating with a view, if possible, to turning what was an invalid marriage into a valid one.

In my view, the effect of a proceeding such as this adoption cannot be judged by reference to any intention the husband may have had locked in his own bosom: his acts must be judged by reference to their own nature and by reference to his declared intentions at the material time. Judged by that standard, it seems to me that the adoption in the circumstances of the present case did fall within the statement of the principle of approbation contained in Lord Watson's speech in *G. v. M.*²³

Accordingly, for the reasons given by my Lord, and for such reasons as I have been able to add to them, I agree that on this issue of approbation the appeal should be allowed, with the consequences that my Lord has indicated.

HODSON L.J. The commissioner in this case pronounced a decree on the ground of the incapacity of the wife. The wife has appealed against the finding of fact and also upon the ground that even if the finding of fact be correct, nevertheless the husband has approbated the marriage, and, therefore, is not entitled to a decree.

The wife has had this finding of incapacity made against her which, of course, imputes no fault in her, but counsel has argued on her behalf that the finding as it stands reflects upon her because it involves a rejection of her evidence as being that of an untruthful witness. He has, therefore, in addition to relying upon that second ground of appeal, sought to say that this court ought to reverse the commissioner on the facts. He has said, with force, that the letters which the husband wrote to the wife are not on the face of them consistent with the case which he now puts forward, and, secondly, that in so far as the commissioner relied upon the cross-examination of the wife as material, which would appear to make her evidence less worthy to be believed, he erred.

Bearing in mind the duty of this court respecting findings of fact by trial judges, who have the advantage of seeing witnesses as well as hearing them, it is impossible, I think, to reject the

²³ 10 App.Cas. 171.

commissioner's acceptance of the petitioner's evidence, which was, on the issue which was fought out below, namely, Aye or No, was this marriage consummated, in favour of the petitioner. That finding, I think, must be accepted. It does not seem to me that it necessarily follows that the wife should be taken as wilfully trying to mislead the court, although her evidence was, on the face of it, entirely inconsistent with that of the petitioner, the issue being really whether or not consummation of this marriage (which was celebrated in January, 1941) took place in the autumn of 1943, after the wife had deliberately, in order to assist the marriage, submitted to an operation. The wife gave evidence that sexual intercourse took place, with complete penetration. When she was asked about this: "Were you 'conscious of any difference on this occasion?'" she said "Yes, 'I was conscious of a feeling in the vagina.'" Then she was asked: "Was anything said about it between you?" and she said: "No. I was so conscious of relief that we had been able 'to do it at last.'" It is very odd, if the operation had been performed with this object that consummation should be effected, and indeed that perfect success followed, that nothing was said. I myself find it incredible to think that the truth really is that at that time, as the wife may well have thought, this marriage, which had not been consummated before, was then perfected. So that, for my part, without perhaps approaching the matter from quite the same point of view as the commissioner, who had the advantage, that I have not had, of seeing the witnesses in the witness box, I see no reason to doubt that the factual conclusion at which he arrived was right.

With regard to the other matter, the commissioner ended his judgment in the last paragraph but one, on the question whether or not this marriage had been approbated, by referring to the state of mind of the husband in this way: "It is quite clear from the 'letters that he was the one to persuade the wife to adopt this 'second child, the first child who was adopted having died, 'because he said he desired his wife to overcome a sort of fear 'she had got, or seemed to have got, over the loss of the first 'child, and he said he was anxious that she should adopt this 'second child, and hopeful that it would help the married life, 'and particularly on the sexual side.'" I think that that passage in his judgment is not based on any evidence that the petitioner had ever given, but rather on a misapprehension of the effect of the letter of February 21, 1945, to which reference has been made by my Lords. The second paragraph of that letter is: "I know

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W. v. W.	“ will you get over that fear, and also a lurking fear every time
Hodson L.J.	“ you hold someone else’s baby. I care for you too much to
—	“ want to see you living for the rest of your life in terror.” In

its context, that passage clearly refers to the sorrow which had come into their lives, and particularly, perhaps, into the life of the wife, by the loss of a child that had been adopted before this, and to the husband’s anxiety to allay her fears and her feeling that she in some way had been responsible for the death of that child, and had nothing to do with the prospects of sexual unity between these people in the future.

But even if the evidence had been such as to justify the commissioner in finding that such was the husband’s state of mind, I agree with what has already been said by my Lords to the effect that the existence of such an intention, certainly an intention locked in his bosom and not declared, would not detract from the effect of his overt act, in concert with his wife, of adopting a child; and I think that that fact, namely, the adoption of the child in 1945, taken in its background in the circumstances of this case with full knowledge of the law and the facts—and I need not elaborate those two qualifications which are implicit in the doctrine relied on here—are sufficient to prevent this man from obtaining a decree on the grounds stated in the speech of Lord Selborne L.C. in the case of *G. v. M.*²³

I agree, therefore, that the appeal should be allowed and the case sent back for rehearing on the issues raised in the pleadings on the prayer for divorce.

Appeal allowed.

Solicitors: Scadding & Bodkin; Bishop & Cooke.

B. A. B.

²³ 10 App.Cas. 171, 186.

CHORLTON v. CHORLTON.

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Feb. 20.

Husband and Wife—Justices—Maintenance order subsisting after decree absolute—Application to revoke on ground of adultery—No evidence that man concerned was a married man—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 7.

Lord
Merriman P.
and
Karminski J.

On an application by a husband whose marriage has been dissolved to discharge a maintenance order made during the marriage by a court of summary jurisdiction, evidence of an act of sexual intercourse subsequent to the divorce will not establish adultery if there is no proof that the man concerned was a married man at the material time.

Abson v. Abson, ante, p. 55, considered.

APPEAL from justices.

A wife obtained a maintenance order on March 28, 1947, on the ground that her husband had deserted her. On January 9, 1950, the marriage was dissolved by decree absolute on the ground that the husband had committed adultery. There was no prayer by the wife for the exercise of the court's discretion. The maintenance order had been allowed to remain in force notwithstanding the decree absolute by virtue of the decision in *Bragg v. Bragg*.¹

The husband now alleged that the wife had on October 27, 1951, committed adultery with a named man and asked that the maintenance order be discharged on that ground. The husband's application was dismissed by the justices on December 7, 1951, who found that although there had been opportunity for sexual intercourse to take place there was no evidence of guilty affection.

The husband appealed.

M. Holdsworth for the appellant husband.

Ian Fife for the respondent wife.

LORD MERRIMAN P. stated the facts and continued:—This application was based on an allegation of adultery with a named man which was alleged to have been committed on October 27, 1951. It is clear that the evidence was directed solely to that date, but it is right to point out, as appears from the justices' reasons, that there had been an earlier attempt by the husband to discharge the order on the ground of the wife's adultery with

¹ [1925] P. 20.

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this particular man at a time before the decree absolute had been pronounced, that is to say when she was, in fact, the wife of the appellant.

A submission was made that there was no case to answer. We have not read the evidence, for a reason I am about to give, but we have read the magistrates' reasons. It was a case in which it was said that these people spent the night alone in the same house, except for the possible presence of a child of 10, in circumstances which would have enabled them to commit adultery. On the submission that there was no sufficient case to answer, the magistrates ruled, in effect, that though there was opportunity there was no evidence of guilty affection.

But it now appears that there was a more fundamental reason for the dismissal of this application and that was that there is no evidence that the man in question was a married man at the material time, and, I may add, there has been an express disclaimer on the part of the husband of any wish for a further hearing to enable him to adduce evidence which was lacking in that respect.

In other words, the case was put forward on the ground that because the wife had been a wife, and because a wife can commit adultery, and because an order in favour of an ex-wife can be kept alive under the authority of *Bragg v. Bragg*,¹ it follows as a matter of law that an ex-wife, as if she were a wife, can commit adultery even with a single man. That is the sort of point that it would have been necessary to argue. A very similar point was raised recently in *Abson v. Abson*,² but in that case the evidence was that the paramour was indeed a married man. That was proved, and it was sought to argue the other way, namely, that because a wife had been divorced she could not commit adultery, though she was having sexual relations with a married man. We took the view that whether that argument was acceded to or not—and I may make it clear at once that it was not an argument which appealed very strongly to either of us, and my brother said very emphatically that it did not appeal to him—it was a case in which the wife should be left to whatever rights she had by reason of her divorce; and I suggest that if any further steps are to be taken in this case by either side, they should acquaint themselves with what this court decided in *Abson v. Abson*.²

¹ [1925] P. 20.

² Ante, 55.

But I am not prepared to accede to the view that a husband can prove adultery against his ex-wife because of sexual intercourse which she, as a woman who has obtained a divorce, has had with a person of the opposite sex, without proving that that person is a married man at the material time. It is for that reason that we have not thought it necessary to consider the weight of evidence which was adduced to show that sexual intercourse took place between these persons on October 27, 1951.

This appeal, therefore, fails and must be dismissed.

KARMINSKI J. I agree entirely with the observations and judgment of my Lord.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker, Baker, for G. H. Morgan & Sons, Shrewsbury; Doyle, Devonshire & Co., for Moxons, Hanley, Stoke-on-Trent.*

J. B. G.

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STRINGER v. STRINGER.

1952
Jan. 17.

Husband and Wife—Separation by agreement—Subsequent summons by wife against husband for wilful neglect to maintain her—Onus on wife of proving husband's agreement for maintenance.

Lord
Merriman P.
and
Karminski J.

Where a husband and wife separate by agreement and the wife subsequently issues a summons against her husband for wilful neglect to maintain her, the onus of proving that the husband has agreed to maintain her lies on the wife.

A husband and wife so separated, there being no written separation agreement, and, thereafter, the husband made no payment of maintenance and the wife requested none, until she issued a summons, more than four years after the separation, alleging wilful neglect by her husband to maintain her. At the hearing the wife did not prove any agreement on the part of her husband, express or implied, to pay her maintenance:—

Held, that the wife's claim failed. There was no onus on the husband to prove affirmatively that there had been no agreement between the spouses that he should pay her maintenance.

Baker v. Baker [1950] W.N. 29; 66 (Pt. 1) T.L.R. 81 followed; dicta of Hill J. in *Papadopoulos v. Papadopoulos* [1930] P. 55, and the inference to be drawn from those dicta explained.

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APPEAL from justices.

In November, 1946, the parties, a husband and wife, separated in circumstances which were held to amount to a consensual separation. There was, however, no formal separation agreement. The husband thereafter made no payment to the wife; and until the wife issued a summons in July, 1951, complaining that the husband had been guilty of wilful neglect to provide reasonable maintenance for her, the wife made no demand on her husband for maintenance. The summons was issued on July 17, 1951, and on October 1, 1951, the justices for the Luton petty sessional division of Bedfordshire found the complaint proved as from July 17, 1951, and awarded the wife 10s. a week. There was evidence before the justices that the summons had been taken out at the prompting of the National Assistance Board, who had been giving financial assistance to the wife. There was no evidence that there had been any kind of intimation to the husband by anyone before the issue of the summons that he was in default in not paying maintenance to the wife. A further summons complaining of desertion was dismissed.

The husband appealed against the finding of wilful neglect to maintain.

The justices in their reasons stated (inter alia): "While "therefore there was no evidence of a deliberate agreement to "separate, we took the view that in all the circumstances of the "case there had been a separation by mutual consent, and that "neither party had been guilty of desertion in law. This state "of affairs, it seemed to us, did not relieve the husband of his "duty to provide reasonable maintenance for his wife, and we "decided on the evidence that the husband had been guilty of "wilful neglect in that respect."

The facts are more fully stated in the judgment of Lord Merriman P.

C. Trevor Reeve for the husband.

K. Bruce Campbell for the wife.

LORD MERRIMAN P. This is a husband's appeal from an order made by the justices for the Luton petty sessional division of Bedford on October 1, 1951, whereby they found that he had wilfully neglected to provide reasonable maintenance for his wife as from July 17, 1951, and awarded the wife 10s. a week. It is important to note that the date at and before which the wilful neglect is charged is the very date on which the summons was

issued, namely, July 17, 1951. It is important for this reason, that it is common ground that these spouses parted in November, 1946; it is common ground that from the time of the parting up to the issue of the summons the husband had not, in fact, paid any maintenance to his wife, and that she had not demanded any maintenance until the issue of the summons; and there was evidence given in the course of the hearing that even then the summons had been taken out at the prompting of the National Assistance Board, who had, I gather, been paying maintenance to the wife. It is right to say that there is no evidence before us, either from the wife herself or from the National Assistance Board, or any other third party, that there had been any kind of intimation to the husband before the issue of the summons that he was in default in not paying maintenance to his wife.

I must add to the circumstances already mentioned that the wife had also charged the husband with desertion. The justices dismissed that summons; but it is rather important to realize the way in which they dealt with it. It is clear that before the justices the husband opposed an order under either head on what would, if established, have been a conclusive answer, namely, that, so far from his having deserted the wife at the time of the parting, she had deserted him. Had that been the case, there was manifestly an end of the charges either of desertion or of wilful neglect to maintain. But the justices did not find that. They noted it, but they came to the conclusion that the parting had not the quality of desertion on the part of either spouse. The husband had left, certainly, because the wife said he had better go; but he had been just as willing to part as she had been. In other words, the justices found that it was a simple case of a consensual separation, and it is important, from the point of view of any subsequent proceedings, that it should be stated that this case has been fought, and quite rightly fought, by the husband on the basis that that finding could not be challenged. It is also important to remember that no formal separation agreement was entered into embodying clauses regulating the relationship of the parties, mutual covenants against molestation or attempting to institute restitution proceedings, and so forth; there was a separation, in other words, about which the proper inference was that neither party had deserted the other; it was simply consensual.

With that in mind, and unchallenged, as I say, by either side, I need not read all the very clear reasoning which the justices have set out justifying that conclusion. [His Lordship read the

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extract from the justices' reasons already quoted and continued:] Speaking for myself, I think that this is an important case, because it does bring to a head a matter about which there is surprisingly little reported authority. Mr. Campbell, for the wife, has very properly called our attention to a passage in the judgment of Hill J., sitting in this court with Lord Merrivale P., in *Papadopoulos v. Papadopoulos*.¹ I will read the passage in a moment, but what, in effect, is submitted is this: where there is a separation of this nature, with nothing really said one way or the other about the question of maintenance, the common law liability of a husband to maintain his wife subsists, unless the contrary is shown, and it is for the husband to show the contrary; and if it is left in doubt, and he does not maintain his wife, there is evidence on which the court can find that he has been guilty of wilful neglect to provide reasonable maintenance.

It is necessary to preface the reading of this passage, which has been referred to more than once, as I shall show, by saying that the case itself, which it is not necessary to examine at great length, is one in which it was hardly necessary to lay down any proposition about where the onus of proof lay. The main issue was whether there had been a good and lawful marriage in this country, according to the laws of England, between a Cypriot and a Frenchwoman, and, if so, what was the effect of certain proceedings, which it is unnecessary to set out in detail, in the Cypriot court at Nicosia purporting to set aside that marriage by a decree by consent and on certain monetary terms. The upshot of it all was that on an investigation of the law on that subject the court unanimously came to the conclusion that the whole of the proceedings in the Cypriot court was nugatory, and that the attempt by the husband to repudiate the marriage in this country was futile. He really had been married here, the wife was his wife, but he had done everything he possibly could to repudiate the marriage, and admittedly had done nothing whatever to maintain her as his wife, and there was no more to be said about it. That was the view which Lord Merrivale P. took of the matter, and I doubt whether it was necessary to say much more.

Hill J. expressed the same view in other words, in the course of which he said²: "The question is whether the husband neglected to provide maintenance. He did not in fact provide maintenance. Neglect means failure in a duty to provide maintenance, and the question is whether he was under a duty to

¹ [1930] P. 55, 68-9.² Ibid. 68.

“ maintain the wife. Prima facie he was. That is the common law of England, and it was for the husband to show that he was excused from that duty.” I have not a word to say against that statement of the law as applied to the circumstances of that case. He then continued: “ A husband may show it in various ways ” (and here again let me say at once I am not attempting to criticize one word of this passage). “ For instance, he may show that his wife has been guilty of adultery, neither condoned nor connived at nor conduced to by the husband, or that she had deserted him and was continuing to desert him, or ” (and now he is getting nearer to the circumstances of that particular case) “ that there is a subsisting binding contract performed and not repudiated by him that she should not claim maintenance otherwise than as provided by the contract ” (that, no doubt, had not merely a general application, but had an oblique reference to the performance which had been gone through in the Cypriot court, and again in the next part is another reference to the Cypriot court), “ or that a court of competent jurisdiction in a proceeding between husband and wife had already determined the rights of the wife in respect of maintenance and that he had fulfilled the obligations so imposed on him.” With regard to both those last two examples, which had been put forward in that case, if there ever was a subsisting binding contract it certainly had not been performed and had been repudiated; and there was no determination by a court of competent jurisdiction of the rights of those two parties, for the court unanimously held that the Cypriot court had no jurisdiction to do what it did. And then finally, and in relation to the whole of the group of examples, Hill J. said: “ But the onus is on the husband to prove the excuse.” From that it is sought to deduce with regard to a matter which was not mentioned by the judge, that if there is a mere agreement to separate, and nothing is said about maintenance or no maintenance, it is for the husband to prove affirmatively that there was a positive agreement that there should be no maintenance; otherwise, his common law liability subsists. We have to consider whether that is sound.

Consciously or unconsciously the justices have applied that passage to this case; very likely consciously, for it is reasonably clear that they framed their decision either on reading it or on some reference to it in a textbook, for their finding is stated very much on those lines. It is right to say that the passage has been cited with approval more than once. I am not going through all

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the various cases, but I think that it will appear on investigation that it has been cited as a very concise and perfectly accurate statement, as one would naturally expect, of some of the instances, as Hill J. himself called them, in which a husband has a complete answer to a demand for maintenance. It was, for example, referred to as being a sufficient guidance for this court, composed of Bateson J. and Langton J., in *Markovitch v. Markovitch*³; it was cited by this court, composed of Bucknill J. and Henn Collins J., in *Richardson v. Richardson*,⁴ as an answer to a claim for maintenance on the part of a wife who was in a state of desertion; and Bucknill L.J., in the Court of Appeal, in *Winnan v. Winnan*,⁵ referred to it in his judgment in a passage where the question was considered whether there was any difference between active desertion and constructive desertion for the purposes of applying the proposition, and holding that there was none. In the course of that judgment⁶ Bucknill L.J. also cited his decision in *Richardson v. Richardson*.⁷ But I think that it may fairly be said that it was used in those cases, without exception, for the purpose of supporting the proposition that these various instances were all absolute defences to a claim for maintenance on the ground of wilful neglect to maintain, and that the court was not thinking in particular whether in any given instance the burden of proof lay on the one side or the other; if the fact was established, wherever the burden of proof lay, it was decisive. At any rate it is, in my opinion, open to us to say that, unimpeachable as the passage itself is, the one sentence, "But the onus is on the husband to prove the excuse," was not necessary to the decision of *Papadopoulos v. Papadopoulos*.⁸

Before I go further, I think it is just as well to bear in mind that, in the end, the question where the onus of proof lies may be of very minor importance, for it will be recalled that in *Churchman v. Churchman*,⁹ in giving the judgment of the Court of Appeal, I am reported as saying that, even with regard to the deliberate change of wording effected by the Matrimonial Causes Act, 1937, in the former section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925¹⁰: "After all, as du Parcq "L.J. pointed out during the argument, the incidence of the "burden of proof as a determining factor of the whole case is "only of importance if the tribunal finds the evidence, pro and

³ (1934) 50 T.L.R. 416, 418.⁴ (1942) 167 L.T. 260, 261.⁵ [1949] P. 174.⁶ Ibid. 181.⁷ 167 L.T. 260.⁸ [1930] P. 55.⁹ [1945] P. 44.¹⁰ Ibid. 52.

“con, so evenly balanced that it can come to no definite conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it and need not be further considered (*per* Lord Dunedin in *Robins v. The National Trust Co.*¹¹).”

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That brings me to consider this question in relation to a particular instance which was not one of those mentioned by Hill J. in *Papadopoulos v. Papadopoulos*,¹² namely, the case of a consensual separation where nothing is said, one way or the other, about maintenance. This court made a pronouncement on that position in *Baker v. Baker*,¹³ in which I am reported as having said, after referring to the facts¹⁴: “There is no law involved in this case; it is merely an application of the principle that, if a wife is living separate and apart from her husband, it is not enough for her to give evidence that her husband had money and that she needed maintenance. The question is: What was the nature of the parting? If the wife can prove desertion, she is, of course, entitled to a maintenance order on that ground. If the separation was consensual, then, if she can prove—and Mr. Crispin accepted that the onus was on the wife—that this was on the basis, expressed or implied, that the husband undertook to be responsible for her maintenance, she is entitled either to the agreed amount (if there was an agreed amount), or to a reasonable amount under the section, although she is living apart from her husband. But unless she can show, where the separation was consensual, that the husband had accepted the liability, expressed or implied, to maintain her, she has no case at all.” Pearce J. agreed with what I had said, and went on¹⁵: “In this case desertion has been negatived, and the wife’s evidence makes it clear that there was here a separation by consent. If by her evidence she could establish that there was expressed or implied in that separation a continuing liability on the husband’s part to support her, this order could stand, but her evidence has not done this, and therefore, in my opinion, there has not been wilful neglect to maintain, and the appeal should be allowed.” There is no doubt, subject to the qualification which I have already mentioned as to the importance or

¹¹ [1927] A.C. 515, 520.

¹² [1930] P. 55.

¹³ [1950] W.N. 29; 66 (Pt. 1)

¹⁴ [1950] W.N. 29, 30; 66 (Pt. 1)

T.L.R. 81, 82.

¹⁵ *Ibid.*

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unimportance of the onus of proof, that the burden is placed differently, at any rate in this particular class of case, from the way in which it is stated in *Papadopoulos v. Papadopoulos*.¹⁶

Before I refer to the subsequent history of *Baker v. Baker*,¹⁷ let us examine for a moment what it all means. In the case now before us five years elapsed since the parting, in the course of which, until this summons was served upon the husband, he had neither by word of mouth nor by writing, either at the time of the parting or at any subsequent time, received any sort of request from his wife for maintenance. She had kept herself, and made it clear that she meant to continue to keep herself. She had done nothing to disabuse her husband's mind of the idea that she was content with this state of affairs until this summons was issued asserting that he had been guilty of wilful neglect to provide reasonable maintenance—and that means had been guilty before the issue of the summons. Let me make it clear at once that we are not dealing with the future; and I have already pointed out that we are not dealing with a case which is complicated by formal covenants about refraining from suing for restitution, or anything of that nature; we are concerned with a simple case of separation by consent, with no stipulations at all.

I ask myself, wherever the onus may be, what is the inference which should be drawn from that, and I can only answer, in the circumstances of this case, by saying that the proper inference is that during the time between November, 1946, and the date on which this summons was issued, this was a consensual separation without any sort of stipulation that the husband should provide maintenance for the wife, and I do not think it is of any importance in this case to pursue further the question of the onus of proof.

But I ought, I think, in justice to this court, to point out that the Court of Appeal have quite plainly accepted our statement of the matter as correct. I do not suggest that *Papadopoulos v. Papadopoulos*¹⁸ was brought to their notice, or that it was suggested that there was any importance in the issue on whom lay the onus, but in *Chapman v. Chapman*,¹⁹ an appeal from a decision of this court consisting of Wallington J. and myself, and heard by Asquith L.J., Birkett L.J. and Harman J., the Court of Appeal gave approval to the passage to which I have just referred. I do not ignore the point that in one sense the

¹⁶ [1930] P. 55.¹⁸ [1930] P. 55.¹⁷ [1950] W.N. 29; 66 (Pt. 1) T.L.R. 81.¹⁹ Unreported, April 4, 1951.

approval may be said to be obiter, because the case was one in which, contrary to the finding of the justices, we had taken the view that whatever grievances the husband might have had, he had, in effect, consented to a separation, and consented in circumstances (this was the second step) which implied an undertaking to maintain his wife. The Court of Appeal said we were wrong on the point of fact in coming to the conclusion contrary to the view of the justices that there had been a consensual separation, and in that sense, of course, the second point did not arise, though they also expressed the opinion, which almost followed necessarily from what they had already said about the nature of the parting, that even if it could be said to be consensual it certainly was not consensual on the basis that the husband undertook the obligation to maintain his wife.

The facts of *Chapman v. Chapman*,¹⁹ however, are of no importance. What is of importance is that in two passages in Asquith L.J.'s judgment, which was concurred in by Harman J., he referred to the point. He first stated the proposition that summonses for desertion and wilful neglect to maintain do not necessarily stand or fall together, and said: "Often two such summonses do so, and if the wife fails on desertion she automatically fails on wilful neglect to maintain, but that is not necessarily or inevitably so. Sometimes, where, for instance, the evidence is that the separation was consensual, she may fail on desertion and win on maintenance; in cases, that is, where the consensus impliedly includes a term that the wife should be entitled to some support from the husband." Later, having considered the major point, which is irrelevant for our present purposes, he concludes his judgment with this passage: "In those circumstances, with great respect, I am of opinion that the inference of consensus cannot be supported; and, if it cannot, then there can be no possible claim to maintenance. There is, indeed, a recent authority which has been cited to us, *Baker v. Baker*,²⁰ which decides very clearly that even where a separation is admittedly consensual it has to be shown either that there was an expressed agreement to pay maintenance or that such an agreement must be implied from the circumstances. In this case I think that the conclusion that there was a consensus at all cannot be supported, and therefore the other point does not really arise." But, as I have

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already indicated, Asquith L.J., in the opening passage of his judgment, was accepting the statement of principle, the affirmation of which he very briefly repeated in the passage I have just read. Birkett L.J., at the end of his judgment, said: "I agree with what my Lord has said, and I do not think for my own part that, on the evidence before the justices and the evidence before the Divisional Court, this inference of consensus can really be supported; but I would just like to add a final word: Assuming for the moment that there had been, in the circumstances of this case, a consensual separation, I do not think it by any means follows that an inference is to be drawn that it was upon the basis that attached to it there should be an undertaking to provide maintenance. I think, on the contrary, almost everything in the case would appear to be against it." He then referred to certain passages in the evidence which I need not read, and concludes: "It does not look, as I say, upon the face of it, that any such inference could be drawn, even if there had been anything in the nature of an agreement to separate, that it should be upon the terms that he would provide maintenance."

I am prepared, supported and reinforced by that authority, to stand by what we said in *Baker v. Baker*.²⁰ But, as I have said already, I do so with the feeling that it does not matter, in this case at any rate, which way the onus is, because on the facts in this case, in my opinion, there is only one inference that can be drawn. The only way in which the case can be put, really, is to say that the common law liability raises a presumption which must be rebutted. But what is necessary to rebut it? It does not advance the argument any further, in my opinion, that an agreement to separate, with a specific agreement whether for a nominal payment, or a substantial payment for that matter, plainly gets rid of the presumption, and is substituted for it. Why is it necessary, therefore, to say that there must be an express agreement before there can be any inference that there is to be no maintenance, if all the facts point to an inference that that must be the condition upon which the parties separated? However, if the question of onus arises, I think that I prefer, and, indeed, I am now bound to prefer, the judgment of this court in *Baker v. Baker*,²⁰ with the meed of approval which has been accorded to it in the Court of Appeal, to the

²⁰ [1950] W.N. 29; 66 (Pt. 1) T.L.R. 81.

inference to be drawn from one sentence in an otherwise unimpeachable passage in the judgment of Hill J. in *Papadopoulos v. Papadopoulos*.²¹

That brings me to the only other point. It is argued that by taking out this summons the wife reopens the whole matter, and that even if there had been an agreement under seal containing every conceivable sort of clause in it which could be put into a separation agreement, it would still be open to the court to say that an order must be made on the ground of wilful neglect to maintain. And in support of that it is submitted that *Tulip v. Tulip*²² is decisive. It is unnecessary to consider the case at any length. The actual decision was that the judge had gone wrong in refusing, in effect, to exercise jurisdiction to make an award under what is now the equivalent, in the High Court, of the summary procedure for wilful neglect to maintain which was imported by the Law Reform (Miscellaneous Provisions) Act, 1949, and is now embodied in section 23 of the Matrimonial Causes Act, 1950, for the Court of Appeal, in effect, took the view that the judge had used expressions in the course of rejecting the wife's application on the ground of wilful neglect to maintain which suggested that he thought the agreement and its punctual performance (for it was a case in which there had been a formal separation agreement carried out for many years and punctually performed) were absolutely conclusive. All that they decided was that the matter must be reheard upon the basis that this court in *Morton v. Morton*²³ rightly decided that however high was the evidential value of the agreement itself, of its punctual performance and so on, it was not absolutely conclusive.

But I think that it is important to bear in mind that in sending *Tulip v. Tulip*²⁴ back for decision upon the merits, whatever the merits might be, considerable emphasis was laid on the fact that before any proceedings were taken at all, the wife had put forward, by letter, a reasoned claim for reconsideration, on the ground that circumstances, not only financial but physical, had changed very much for the worse for her, and very much in favour of the husband, at any rate financially. It was not a case in which, without any sort of warning at all, it was held to be open to charge a man with wilful neglect to provide reasonable maintenance when he had done everything that he was bound to do under the deed or under the terms of the

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separation, without any complaint before the issue of the summons. I can see nothing here which justified the wife, at the time when she issued this summons, in asserting that her husband had been guilty of this offence.

I think it right to state now that Mr. Reeve has said, from the very first, and with perfect candour, that it does not necessarily follow that the husband will be able to take up that position indefinitely. It is not for us to lay down here and now what steps it may be appropriate for the wife to take to put herself in a position to claim maintenance; but it must be acknowledged that it is easier for her to do so in a case like this, where there was no binding agreement to live separate and apart for any given period, or indefinitely, and where no particular terms were specified as to the conditions upon which they were to live apart. Any attempt to formulate the steps to be taken would obviously be most injudicious, and, therefore, I refrain from attempting to indicate them.

The result is that in my opinion, on the facts as they stood at the time when the justices decided this case, there was no ground for making this order. The appeal will, therefore, be allowed and the order set aside.

KARMINSKI J. I agree with the judgment of my Lord. The justices found as a fact that in this case there had been a separation by mutual consent, and that neither party had, therefore, been guilty of desertion. With that finding of fact there has been no quarrel; and it is clearly supported by the evidence before the justices. But the justices went on to say: "This state of affairs did not, it seemed to us, relieve the husband of his duty to provide reasonable maintenance for his wife, and we decided on the evidence that the husband had been guilty of wilful neglect to maintain in that respect."

It is fair to the justices to say that apparently their attention was not called to any authorities, whereas we have had the advantage of a very full and careful argument by counsel on both sides. It is possible, if I may hazard a surmise, that the paragraph I have just read from the justices' findings is founded on a misapprehension as to the matter set out on pp. 1092-3 in the 83rd edition of Stone's Justices' Manual, to which, it may be, their attention was called.

The only matter on which I have found any difficulty in this case arises from some observations to which my Lord has

referred in the judgment of Hill J. in *Papadopoulos v. Papadopoulos*,²⁵ where Hill J., dealing with the facts of that particular case, proceeded to give a number of examples whereby a husband was excused from his common law duty to maintain his wife. I do not think for a moment that Hill J. meant that list of instances to be exhaustive. He was merely exemplifying his proposition, because, after the words to which my Lord has referred—"But the onus is on the husband to prove the excuse"—Hill J. went on to set out what in that case the particular excuse or excuses was or were supposed to be, namely, that first of all the husband was excused by a decree of a court in Nicosia, and secondly, that he was excused by an agreement between the spouses embodied in the decree of that court. Hill J. was not there considering what we have to consider here, namely, a case where the spouses had separated by mutual consent and where there was no desertion on one side or the other.

On a careful consideration of the decision in *Papadopoulos v. Papadopoulos*,²⁶ together with the more recent decision in *Baker v. Baker*²⁷ by this court, I can find no real inconsistency. The test as set out in *Baker v. Baker*²⁷ is simply this: where the separation was consensual the wife must show that the husband had accepted the liability, expressed or implied, to maintain her; otherwise, she has no case to put forward on neglect to maintain. That decision, as my Lord pointed out, has recently been approved by the Court of Appeal. I find that on the facts before the justices the wife did not prove any agreement, expressed or implied, that her husband would maintain her, and for that reason I agree that this appeal succeeds.

Appeal allowed.

Solicitors: *Machin & Co., Luton; Peacock & Goddard, for Cooke & Sons, Luton.*

J. B. G.

²⁵ [1930] P. 55, 68-9.

²⁶ [1930] P. 55.

²⁷ [1950] W.N. 29; 66 (Pt. 1) T.L.R. 81.

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March 6;

April 7.

Evershed M.R.,
Jenkins and
Hodson L.JJ.

Divorce—Maintenance—To secure to wife gross or annual sum for any term, not exceeding her life—Order that sum be “secured by a general charge on all the husband’s assets”—This charging order improper—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 19 (2), s. 28.

A judge in chambers confirmed the order of a registrar made under section 19 (2) of the Matrimonial Causes Act, 1950, on the application of a wife, who had obtained a decree of divorce, for maintenance, that an annual sum of £300 should be “secured by a “general charge on all of her former husband’s assets,” with a provision for reference to conveyancing counsel of the court to settle the necessary deeds in default of agreement between the parties.

Held, that an order charging all the husband’s assets was improper as being at once oppressive in effect, uncertain in operation, difficult of enforcement and of doubtful validity.

It might have been preferable, having regard to the husband’s possessing no readily chargeable means, to direct the husband to enter into a covenant to pay to the wife an appropriate part of his earned income and the more so because the payment could be reduced or extinguished under the Matrimonial Causes Act, 1950, s. 28 (1) and (2). But ever since the Matrimonial Causes Act, 1857, the word “secure” had been treated as inconsistent with a covenant for payment.

Medley v. Medley (1882) 7 P.D. 122, *Shearn v. Shearn* [1931] P. 1 and *Yates v. Starkey* [1951] Ch. 465, applied.

APPEAL from orders of Collingwood J. and Pearce J. sitting in each case in chambers.

On November 16, 1935, the husband, Eric Albert Barker, and the wife, Ida Irene Behenna Barker, were married. On December 29, 1950, the wife petitioned for and subsequently obtained a decree of divorce on the ground of her husband’s desertion. The wife applied for an order for maintenance, and on May 1, 1951, Mr. Registrar Long made an order (called the first order: see section 19 (2) of the Matrimonial Causes Act, 1950) that the husband should secure to the wife for her life, as from the date of the decree absolute (May 12, 1951), the annual sum of £300 a year less tax by monthly instalments until the child of the marriage attained the age of 21 years and, thereafter, the annual sum of £200 a year less tax by monthly instalments, both sums to be secured on security selected by the husband, provided that, in default of agreement as to the nature of the security, either party was to be at liberty to apply to the registrar. By the same

order it was further directed (see section 19 (3) of the Matrimonial Causes Act, 1950) that the husband should pay to the wife as from the same date the sum of £400 a year less tax by monthly instalments during their joint lives until further order and for the child until further order £120 a year less tax by monthly instalments.

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An appeal by the husband was dismissed by Collingwood J. sitting in chambers on the ground that his proper course was to apply to the registrar for any variation of his order. On the matter again coming before the registrar on August 2, 1951, he made an order (called the second order) that the annual sum of £300 less tax referred to in the first order should be "secured by "a general charge on all of" the husband's "assets," with a provision for reference to conveyancing counsel of the court to settle the deeds if the parties failed to agree. Pearce J., sitting in chambers, dismissed an appeal from this order.

The husband thereupon appealed by leave of the court from the decisions of both judges on the grounds, first, that the form of security directed by the second order was wrong in principle, and, secondly, that having regard to the husband's means the order to secure to the wife £300 a year less tax, reducible to £200 a year less tax on the child attaining 21 years of age, was excessive in amount and beyond the husband's means.

The details of the husband's means are set out in the judgment of the court.

Gilbert Beyfus Q.C. and *James Stirling* for the husband. The means of the husband when examined are so inadequate that the first order for maintenance, in so far as it secured to the wife £300 a year less tax until the child of the marriage attained 21 years of age and £200 a year less tax thereafter, cannot stand under the Matrimonial Causes Act, 1950, s. 19 (2), by which the order securing to the wife an annual sum for any term, not exceeding her life, is to be arrived at "having regard to her fortune, if any, "to the ability of her husband and to the conduct of the parties." The wife's means were admittedly exceedingly small, but the husband's means are entirely insufficient to carry the burden of the sums charged on it.

Again, the second order securing those sums by "a general "charge on all of" the husband's "assets" is highly improper, for the charge would be on everything the husband possessed, even his clothes and personal effects, and everything the husband possessed would be frozen. The court wholly disapproves of

C. A. an order bringing pressure: *Howard v. Howard*.¹ [They also referred to *Yates v. Starkey*.²] [They were stopped.]

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Heathcote-Williams Q.C. and *Emrys Roberts* for the wife. As to the order for a general charge, the form of the order was to be settled by conveyancing counsel, and the general charge contemplated must, it is contended, be a floating charge: see a precedent No. 272 in the *Encyclopaedia of Forms and Precedents*, 3rd ed., Vol. 10, having that effect, and *In re Kelcey*,³ where it is recognized that a general charge can be properly given. Further, it is suggested that, apart from shares in a certain company which were yielding no interest, the husband had practically no assets having regard to his father's charge. The burden imposed by the general charge would be very nearly valueless and it could not therefore be said to inflict on the husband a burden which ought not to be imposed on him. Further, having regard to section 19 of the Matrimonial Causes Act, 1950, the discretion of the court would be unfettered: compare, also, *Chichester v. Chichester*.⁴ If, then, there is power to make such an order this court ought not to intervene. If the husband has not the means to pay the sum of £300 a year so secured, no harm is done.

Gilbert Beyfus Q.C. in reply. The order can only be made by regard to the ability of the husband, and the court will not make a vain order.

Cur. adv. vult.

April 7. EVERSHERD M.R. I will ask Jenkins L.J. to read the judgment of the court.

JENKINS L.J. This is an appeal (by special leave of this court) by the respondent, Eric Albert Barker (whom we will call "the husband") from an order of Collingwood J., dated June 14, 1951, dismissing his appeal from an order of Mr. Registrar Long dated May 1, 1951, and also from an order of Pearce J., dated November 13, 1951, dismissing his appeal from a further order of the same registrar dated August 2, 1951. The two orders of the registrar thus unsuccessfully appealed from had been made upon the application of the petitioner, Ida Irene Behenna Barker (whom we will call "the wife"), for maintenance consequent on the dissolution, on her petition, of her marriage to the husband on the ground of his desertion. [His Lordship then stated the

¹ [1945] P. 1.

² [1951] Ch. 465.

³ [1899] 2 Ch. 530.

⁴ [1936] P. 129.

effects of the two orders of Mr. Registrar Long and the decisions on appeal from them.]

The husband now appeals from the orders dismissing his appeals from the first and second orders of the registrar. The grounds of his present appeal are substantially, first, that the form of security directed by the second order, namely, "a "general charge on all of " the husband's "assets" is wrong in principle, and, secondly, that having regard to the husband's circumstances, and the nature and value of, and prior charges upon, his capital assets, the annual sum of £300 reducible to £200 when the child attains 21 directed to be secured is excessive in amount, and has not been fixed in accordance with the principles upon which the discretion conferred on this court by the relevant statutory provisions ought to be exercised, and in particular is in disregard of "the ability of " the "husband." The husband has not been primarily concerned to complain of the total amount which he has been called upon to pay or provide, namely, £940 per annum gross (approximately); but he has strenuously contended that upon a proper exercise of the court's discretion he should not, and cannot, be called upon, at least at the present time, to "secure" to the wife any annual sum approaching £300 or even £200.

Before passing to a consideration of the relevant statutory provisions we will briefly summarize the evidence as to the circumstances of the parties. The wife has no means of her own apart from savings certificates worth (at the date of her affidavit sworn on April 16, 1951) £738 1s. 2d., an insurance policy the surrender value of which then amounted to £301 5s. 0d., and furniture and effects valued by her at £100, and she has to maintain the child of the marriage, Dudley Eric Reynolds Barker. The husband was at the date of his affidavit of means sworn on February 9, 1951, employed by a certain company at a salary of £2,000. That company is a private company with an issued capital of £15,730, divided into 15,380 ordinary and 350 preference shares of £1 each held as to 5,000 ordinary and 200 preference shares by the husband, as to 10,280 ordinary and 150 preference shares by his father, and as to the remaining 100 ordinary shares by his mother. The company has been carrying on a large volume of business—according to the figures which have been put in evidence—its total sales during the calendar year 1950 amounted to close upon £1,000,000—but clearly it is, and has at all material times been, short of working

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capital. At the end of the same calendar year, 1950, it appears that the company owed to its bankers, Lloyds Bank Limited, £114,566, and to trade creditors the still larger figure of £165,600; and we were told in the course of the hearing that since the affidavits before us were sworn a receiver has been appointed by Lloyds Bank as debenture holder of the company, and that the receiver has since his appointment continued the employment of the husband in the company's business at a reduced salary of £1,250 per annum. In addition to his holding of 5,000 ordinary and 200 preference shares of the company the husband owns (i) the freehold house bought in 1946 for £3,250, which is his home, New Ferry House, Wraysbury, but which is subject to a first mortgage for £3,000 and a second mortgage in favour of his father of £3,750, with arrears of interest amounting at the date of his affidavit of means to £469; (ii) furniture valued at £1,000; (iii) a motor-launch valued at £350; (iv) savings certificates worth at the date of his affidavit of means £504, and £750 3 per cent. Savings Bonds, both these assets being charged to Midland Bank Limited to secure an overdraft amounting on July 2, 1951, to £544 6s. 0d., making the net value of these two assets about £710; (v) two policies of insurance on his life with an aggregate surrender value as at the date of his affidavit of means of £1,320.

It is, we think, not beside the point—since it has a bearing on the affairs of the company—to refer to the circumstances in which the husband's house came to be charged to the extent that it is. At the time of its acquisition the husband's father appears to have advanced to the husband the money required for the purchase, together with a further sum of £500 for its equipment (£3,750 in all) taking an equitable charge by deposit with him (the father) of the deeds of the house. When, at a later stage, it became a matter of urgency to provide further liquid resources for the company, it was arranged that the maximum sum possible should be raised by way of first mortgage on the husband's house and made available to the company. The sum that was procured by this means was £3,000, and thereupon the husband's father released his charge and possession of the deeds to enable the mortgage to be effected, taking himself a second charge for the sum due to him, namely, £3,750. Interest at the rate of $4\frac{1}{2}$ per cent. is payable in respect of the sum due on the first mortgage and interest at $2\frac{1}{2}$ per cent. is payable on the loan from his father to the husband; but at the present time this latter interest is five years in arrear and, as

already mentioned, the sum due in respect thereof at the date of the husband's affidavit of means was £469.

It will thus be seen that (disregarding the house as mortgaged for more than its full value, even if it is permissible to regard its value as being to some extent in excess of its purchase price) the husband's net assets, apart from his holding of shares in the company, consist of the equity of redemption in the savings certificates and savings bonds £710, the surrender value of the policies £1,320, the furniture £1,000, and the motor-launch £350, a total of £3,380, as against which his father must be considered as an unsecured creditor to an extent of £3,000 at least in respect of the deficiency in his security for principal and interest consisting of his second charge on the house. It is further to be observed that none of these assets as they stand produce any income apart from £22 10s. 0d. from the savings bonds. On the other hand, the husband is liable for interest on the mortgage and second charge and on the overdraft. It would, however, be possible by realizing all these assets, and by ignoring altogether the father's claim as an unsecured creditor, to provide a fund of, say, £3,000 or (leaving the husband his furniture, of which it would hardly be reasonable to deprive him) of, say, £2,000, which when invested might be expected to provide, say, £70 to £80 per annum for the wife. But this would involve stripping the husband of virtually all his capital assets except his holding of shares in the company, besides leaving him over £3,000 in his father's debt. As to the husband's 5,000 ordinary and 200 preference shares of the company, they are not producing and, according to the evidence, never have produced any income; and though the company appears to have made a net profit during the calendar year 1950 of £6,825, it is not surprising that, in the circumstances, no part of this sum was or could have been distributed by way of dividend. The future prospects of the company's business are therefore, at best, problematical, though in view of the large volume of turnover there seems at least a possibility that the husband's shares may ultimately turn out to be of value.

What, in these circumstances, is the proper course to take as regards secured maintenance for the wife during her life and the son during his minority as distinct from unsecured payment during the joint lives of the husband and the wife?

The relevant statutory provisions now in force are these. The Matrimonial Causes Act, 1950, by section 19, provides: "(2) On

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" any decree for divorce or nullity of marriage, the court may, if
" it thinks fit, order that the husband shall, to the satisfaction
" of the court, secure to the wife such gross sum of money or
" annual sum of money for any term, not exceeding her life, as,
" having regard to her fortune, if any, to the ability of her
" husband and to the conduct of the parties, the court may deem
" to be reasonable; and the court may for that purpose order
" that it shall be referred to one of the conveyancing counsel of
" the court to settle and approve a proper deed or instrument to
" be executed by all the necessary parties, and may, if it thinks
" fit, suspend the pronouncing of the decree until the deed or
" instrument has been duly executed. (3) On any decree for
" divorce or nullity of marriage, the court may, if it thinks fit,
" by order direct the husband to pay to the wife, during their
" joint lives, such monthly or weekly sum for the maintenance
" and support of the wife as the court may think reasonable, and
" any such order may either be in addition to or be instead of an
" order made under the last foregoing subsection." Any order
made under either subsection of section 19 may now be subse-
quently varied by further order. For, by section 28 (1), it is (so
far as relevant) provided: " Where the court has made an order
" under section nineteen, section twenty, section twenty-two . . .
" of this Act, the court shall have power to discharge or vary the
" order or to suspend any provision thereof temporarily and to
" revive the operation of any provisions so suspended." Sub-
sections (2) and (3) of the same section are as follows: " (2) The
" powers exercisable by the court under this section in relation
" to any order shall be exercisable also in relation to any deed or
" other instrument executed in pursuance of the order. (3) In
" exercising the powers conferred by this section, the court shall
" have regard to all the circumstances of the case, including any
" increase or decrease in the means of either of the parties to the
" marriage."

Before passing to the more difficult question, what security can properly be ordered in the present case, and for what amount, we can dispose quite shortly of the form of security directed by the second order. Whatever else may be right, we must express our disapproval of an order that the sum awarded is to be secured by " a general charge on all of " the husband's " assets." If the charge ordered to be given in these sweeping and indiscriminate terms is to be understood as comprising all of the husband's assets at the date of the order (or, alternatively, at

the date of the deed giving effect to it) then it would include everything that the husband had in the world, even his clothes and personal effects, the loose change in his pockets, and any balance due to him in respect of salary at the date in question. The whole of his assets at that date (including such items as we have mentioned) would be completely frozen. If, on the other hand, what is intended is a floating charge of like scope but extending to assets present and future, then its effect would apparently be to leave the husband free to deal with his assets as he chose until the wife or trustees as holders of the charge on her behalf intervened to enforce the security when it would attach to every single thing then possessed by the husband. In either case the charge, so far as it related to personal chattels, would be void unless registered as a bill of sale; and (if the security was intended to operate as a floating charge) it would, so far as we can see, necessarily be void under the Bills of Sale Acts as regards the personal chattels comprised therein owing to the impossibility of complying with the statutory requirements as to form and registration. Mr. Heathcote-Williams, for the wife, submitted that the "general charge" intended by the second order was a floating charge, and he endeavoured to support it by reference to a precedent in the Encyclopedia of Forms and Precedents, 3rd ed., Vol. 10, Precedent No. 272, and to *In re Kelcey*,⁵ as showing that general charges of this description were not necessarily invalid or ineffective as to some kinds of property or assets. He admitted the difficulty we have mentioned, but this difficulty, together with the palpable absurdity of including in the charge such things as clothes and personal effects, he sought to surmount by saying that the true intention of the second order was to exclude personal chattels and to leave it to conveyancing counsel to select such assets or types of asset as could appropriately be charged, and to settle a suitable form of charge on the assets or types of asset so selected. But this surely will not do. It is for the court to specify the assets on which the security is to be given and not to delegate its discretion in the matter to conveyancing counsel. Nor does the second order in fact purport to effect any such delegation. It directs in plain terms a general charge on all of the husband's assets and must be construed as meaning what it says. So construed it seems to us to direct a charge which would be at once oppressive in effect, uncertain in operation, difficult of enforcement, and of

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⁵ [1899] 2 Ch. 530.

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doubtful validity. We find it indeed difficult to resist the conclusion that such an order offends against the principle stated by this court in *Howard v. Howard*,⁶ namely, that orders under the subsection should not be used in *terrorem* in order to bring pressure to bear on a respondent husband (and on other persons) to contrive to make provision for a wife which they could not otherwise be required to do. It follows, therefore, in our view, that the second order cannot stand.

The question then arises what security, if any, should, in all the circumstances of the case, be directed in place of the general charge directed by the second order and for what amount. It is, at first sight, an attractive solution to construe the language of section 19 (2) as framed in terms sufficiently wide to include an order for security in the form of a covenant by the husband to pay a specified annual sum during the life of the wife with or without a charge of the annual sum in question on specified assets of his. If this were a legitimate application of section 19 (2) it would provide a convenient method to adopt in a case like the present case in which the husband has assets of considerable potential value but not for the time being producing any income or readily convertible into income-bearing assets and is also possessed of a substantial earned income. A fair result might well be produced in such a case by fixing the total annual amount which the husband could reasonably be required to pay to the wife having regard to the amount of his earned income for the time being, directing the husband to enter into a covenant to pay a suitable proportion of that annual amount to the wife during her life and, further, directing him to charge any asset capable of being conveniently charged as security for the covenanted sum, but on terms that no steps were to be taken to enforce the charge so long as the covenanted sum was duly paid. Security by way of covenant would also be a convenient and suitable form of security in the possible case of a husband with no chargeable or readily chargeable capital assets, but possessed of a large income held for his life on protective trusts for his benefit and, therefore, incapable of being charged. And no hardship would now be caused to a husband by dealing with the question of secured maintenance in this way, for under section 28 (1) and (2) the amount of the covenanted payment could be reduced or extinguished by the court in the event of his circumstances changing for the worse; while the wife would be accorded

⁶ [1945] P. 1.

some measure of protection against the contingency of the husband's death and the consequent cessation of any unsecured maintenance. As the law stood before the Act of 1950 secured maintenance had to be irrevocably fixed once and for all, and in those circumstances security by way of covenant, as opposed to charge or transfer of assets capable of producing the amount of secured maintenance ordered, would have been fraught with a risk of hardship to the husband which in view of section 28 no longer obtains.

But it appears that such a construction is contrary to the view that has consistently been taken in practice of the effect of the subsection and its statutory predecessors. Provision for securing a gross or annual sum to a wife was first contained in section 32 of the Matrimonial Causes Act, 1857, the terms of that section being, so far as relevant, substantially identical with those of section 19 (2) of the Act of 1950. The Act of 1857 made no other provision for the maintenance of a wife, and there was no power to order payments to be made by a husband to a wife in divorce cases, apart from interim orders for payment of money by way of alimony or otherwise such as the court would have ordered in suits instituted for judicial separation. The omission was remedied by the Matrimonial Causes Act, 1866, the second recital in the preamble of which was: "And whereas it sometimes happens that a decree for dissolution of a marriage is obtained against a husband who has no property on which the payment of any gross sum or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives." Section 1 of the Act then proceeded to confer on the court power to order the payment by a husband to a wife of maintenance during the joint lives in terms corresponding to those now comprised in section 19 (3) of the Act of 1950, with a power for the court, in the circumstances mentioned, thereafter to discharge or modify any such order.

In the case of *Medley v. Medley*⁷ the question arose in this court whether the powers contained in section 32 of the Act of 1857 and section 1 of the Act of 1866 were cumulative or alternative. The decision was in favour of the latter view, a result which was reversed by section 1 (2) of the Matrimonial Causes Act, 1907. But in the course of their judgments in *Medley v. Medley*⁷ the members of the Court of Appeal

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⁷ (1882) 7 P.D. 122.

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discussed the proper interpretation to be given to the word "secure" in the Act of 1857 which (though the question was not necessary to the decision of the case) seems at any rate to be inconsistent with the conception that a covenant for payment of an annual sum was comprehended within the "security" contemplated by the Act of 1857. Thus Sir George Jessel M.R., after referring to the recital which we have quoted from the Act of 1866, concluded⁸ that the word "secure" in the Act of 1857 should be given a meaning contrasted with that of the word "pay." "Therefore," he said, "it appears to me that it was "not intended by the first Act that an order should be made for "payment of the allowance directly by the husband to the wife." Similarly, Lindley L.J. said⁹: "I think it is clear that" the word "secure" "does not include payment, but the sum gross "or annual was to be secured so as to provide a fund for the "wife."

As we have said, this view of the limited significance of the word "secure" appears to have been followed ever since (see, for example, *per* Hill J. in *Shearn v. Shearn*¹⁰). And there is the further question whether—at any rate in the absence of the clearest words in the statute—it would be in accordance with principle to order a man to enter into a promise (as would be involved in a deed of covenant) to which he had not already assented. (See also the distinction drawn between orders to secure and orders to pay by Hodson L.J. in *Yates v. Starkey*.¹¹) We do not therefore think that we should now depart (even if it were open to us to do so) from what appears to have been the settled practice of the court in the matter of secured maintenance.

The question therefore is: What security (if any) in the form of actual assets can the husband be reasonably required to provide and for what annual amount? As to amount, it seems to us reasonably plain that he cannot now provide assets sufficient to secure £300 per annum or anything like that figure. Nor do we think it reasonable that he should be required to surrender his policies or recover from the bank, with a view to charging them, his savings certificates or savings bonds, or the balances thereof remaining after discharging his overdraft. The house is already charged for something like twice its value, and we see no ground on which the husband's father could in effect be compelled to surrender his second charge. The husband clearly

⁸ 7 P.D. 122, 124, 125.

⁹ *Ibid.* 125.

¹⁰ [1931] P. 1, 4.

¹¹ [1951] Ch. 465, 489.

should not be made to sell his furniture. The motor-launch might no doubt be sold without hardship to him, but the amount is hardly worth troubling about. In substance, what is left is his holding of 5,200 shares in the company, unrealizable and producing no income at present but nevertheless of potential value. In all the circumstances we think the best that can be done will be to order the husband to secure to the wife £100 per annum by a charge on the 5,200 shares, with a proviso that this annual sum is to be paid only out of the income of the shares or of any investments from time to time representing the same, such charge to be non-cumulative. We think this form of security is warranted by the section, and, although it has obvious imperfections, it will at all events secure something to the wife in the event of the company recovering from its present difficulties.

We think, therefore, that the appeal should be allowed, that the second order should be set aside, and that the first order should be varied by substituting for the provision made thereby for securing an income to the wife of £300 per annum for her life (reducible as therein mentioned) a provision providing for the sum of £100 per annum to be secured to her for her life in the manner above mentioned, it being, if necessary, referred to conveyancing counsel of the court to settle the necessary instrument of security.

In the course of his argument for the husband, Mr. Beyfus, as we understood him, was disposed to submit to an order for the payment of unsecured maintenance to the aggregate annual amount of the secured and unsecured maintenance provided for by the first and second orders, so long as the provisions in regard to secured maintenance were discharged. On this basis it would seem that the annual sum ordered to be paid during the joint lives should be increased by £300 (reducible as mentioned in the first order) less such amount as may be provided in any year during the joint lives by means of the security now to be ordered. We are, however, prepared to hear counsel further as to the amount of unsecured maintenance which should be awarded in view of our decision as to the secured maintenance.

*Appeal allowed. Second order set
aside and first order varied.*

Solicitors: *Withers & Co.; C. M. A. Baker, Harrow.*

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Husband and wife—Maintenance—Wilful neglect to maintain—Reasonable belief in wife's adultery—Defence to claim for maintenance—Relation of duties to cohabit and maintain.

If the conduct of a wife has been such as to create in the mind of her husband a reasonable belief that she has been guilty of adultery, so long as that reasonable belief, so induced, lasts the husband has a sufficient defence to proceedings taken by her whether based on desertion or a wilful neglect to provide reasonable maintenance.

Glenister v. Glenister [1945] P. 30 applied.

Per Pearce J.: Unless there is some agreement, made expressly or by implication between the parties, the duty to cohabit and the duty to maintain are co-extensive; and where circumstances have excused the husband from his duty to cohabit he cannot be held guilty of wilful neglect to maintain.

APPEAL from Cumberland justices sitting at Barrow-in-Furness.

The parties were married in 1929. In October, 1951, the husband turned the wife out of the matrimonial home following a quarrel concerning her relationship with another man. The relevant circumstances of that quarrel are set out in the judgment.

The wife issued a summons alleging desertion and wilful neglect to provide reasonable maintenance; the justices found wilful neglect to maintain but dismissed the charge of desertion. They stated in their reasons: "The reasons for our decision are "that we were of the opinion that the conduct of the wife was "not such that adultery by her could be inferred, but that her "conduct was nevertheless such that the husband was justified "in putting an end to cohabitation by turning his wife out of the "matrimonial home, and that this act by the husband was not "desertion without reasonable cause.

"We were not of opinion that the conduct of the wife was "such as to absolve the husband from his liability to maintain "her, and that therefore he was not justified in his refusal to "provide reasonable maintenance for her.

"Accordingly, we dismissed the complaint alleging desertion "by him, but found proved the complaint alleging that he had "been guilty of wilful neglect to provide reasonable maintenance "for his wife, and on that ground we made an order requiring "the husband to pay a sum of 10s. per week towards the

“ maintenance of his wife, regard having been had to the means
“ and the conduct of both parties.”

The husband appealed against the finding of wilful neglect to maintain; the amount ordered by the justices was not challenged.

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John B. Latey for the husband. The justices, having found that the husband was entitled to bring the cohabitation to an end because he entertained a reasonable belief induced by his wife's conduct that she had committed adultery, were right in holding that he had not been guilty of desertion. The principles applied and the reasoning set out in *Glenister v. Glenister*,¹ and the subsequent cases in which that decision had been approved, applied equally where a husband was alleged to have been guilty of wilful neglect to provide reasonable maintenance. The justices were wrong in law in holding that the husband had been guilty of wilful neglect to maintain.

A. Richard Ellis for the wife. *Glenister v. Glenister*¹ and subsequent cases decided merely that a husband's reasonable belief, induced by his wife's conduct, that she had committed adultery was a good defence to a charge that he had deserted her. There was no reported authority that it absolved him from his obligation to provide her with reasonable maintenance.

LORD MERRIMAN P. referred to the findings of the justices and continued:—The case is interesting and in one respect important, for it raises the question whether or not the principles on which *Glenister v. Glenister*¹ was decided apply not only to a case of desertion but also to a case of wilful neglect to maintain.

It is not necessary, having regard to the helpful way in which this case has been presented to us on both sides, to go into an elaborate review of the facts. Suffice it to say that it is common ground that although the husband resisted the summonses on the ground that his wife had committed adultery (though it is conceded that no formal charge had been made to that effect, and she had been given no formal notice of the charge), in substance the case was fought upon the basis that by her conduct she had induced a reasonable belief in the husband's mind that she had committed adultery, whether that were the fact or not. I propose to deal with the case on that basis.

The justices, in substance, have found that there was not sufficient evidence that the wife had committed adultery, and I see no reason whatever for interfering with that finding. On the

¹ [1945] P. 30.

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other hand, if not in so many words, they found what is agreed by both counsel, that the case, at any rate so far as desertion was concerned, came within the *Glenister v. Glenister*¹ principle, namely, that the wife had induced a reasonable belief in the husband's mind that she had committed adultery. On that basis they found that the husband, who had, in effect, turned her out of the matrimonial home as the result of a quarrel over her supposed relationship with a certain man, was not guilty of desertion without reasonable cause; but they held that the conduct of the wife was not such as to absolve the husband from his liability to maintain her, and, therefore, that he was not justified in refusing to provide reasonable maintenance for her. Accordingly, they dismissed the one summons and found the other proved.

It is also agreed that whatever the implications of this finding may be for the future, about which I do not propose to speculate, this case must be judged as matters stood at the time when the summonses came before the justices, and before they had found that there was not sufficient evidence to establish that adultery had been committed. Both counsel have, quite rightly, pressed us to decide the question as a strict matter of law on the facts which I have outlined, and not to be diverted from doing so by the possibility that the very finding itself may or may not render the question of the husband's liability to maintain his wife for the future purely academic.

Before I examine the law I must add one other circumstance. I am satisfied that the justices were entitled, in effect, to hold that as regards the charge of desertion this case was governed by *Glenister v. Glenister*,¹ and to direct themselves accordingly. Without an elaborate examination of the evidence, it is sufficient to say that it is plain that to the knowledge of the husband, and in defiance of his wishes, the wife had been associating with the man in question, and that when the last quarrel over the association took place, which resulted in his shutting her out of the house, the wife assumed a thoroughly defiant attitude. She threw what turned out eventually to be merely a pay-packet at him, saying, "There is the evidence you want—french letters"; and when the husband suggested a reconciliation she said that she intended to go away with this man, and admitted that she had confessed what she was pleased to call "her guilt" to his son, though she tried in the witness-box to qualify that admission

¹ [1945] P. 30.

by saying that it only meant guilt in associating with him, and not guilt in committing adultery. It is unnecessary to say more than that such evidence clearly raises, and, indeed, it is not seriously disputed that it raises, the class of case in which by her own conduct the wife deliberately induced in the husband's mind the belief in her guilt.

There is no cross-appeal against the dismissal of the charge of desertion, and nothing more remains to be said about it. The question is whether, in spite of that perfectly correct decision about desertion, the justices were nevertheless entitled to hold, on the same set of facts, that the husband had wilfully neglected to provide reasonable maintenance for his wife. It is true that so far as the Summary Jurisdiction (Married Women) code is concerned, all the decisions on this point relate to the offence of desertion, and none of them to the offence of wilful neglect to maintain; but I have had some difficulty in understanding why, in circumstances such as those prevailing in this case, there should be thought to be any logical distinction between the two. It is not, as was at one time suggested in argument, a question whether reasonable belief that the wife had committed adultery would absolve the husband for all time from maintaining her. The question is something much narrower than that, for that, of course, would be absurd. It is whether, at a time when the husband reasonably holds the belief in his wife's adultery which has been induced, and, as in this case, deliberately induced, by her own conduct, or representations, or whatever the case may be, he can be charged, while that belief so induced lasts, with wilful neglect to maintain his wife.

I do not propose to review all the authorities. It is sufficient for our purposes to say that *Glenister v. Glenister*¹ has now been dealt with twice in the Court of Appeal, once (I have to utter the caution) by the author of the original judgment presiding in the Court of Appeal in *Everitt v. Everitt*.² I will refer, without citing it, to one passage. [His Lordship gave the reference in the Reports³ and continued:] I will couple with that the judgment of Hodson L.J. in *Allen v. Allen*,⁴ where Hodson L.J., picking up the passage to which I have just alluded, said⁵: "*Glenister v. Glenister*⁶ was referred to by Lord Merriman P. "sitting as President of a Division of this court in *Everitt v.*

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¹ [1945] P. 30.² [1949] P. 374.³ Ibid. 379-80.⁴ [1951] W.N. 322; [1951] 1 All E.R. 724; affirming [1950] W.N. 593.⁵ [1951] 1 All E.R. 724, 728.⁶ [1945] P. 30.

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"*Everitt*,⁷ and he there emphasized what is, in my judgment, an essential feature of the defence which the husband sought to raise in the present case, namely, its temporary nature, because, although at one moment a person may be able to say that he or she reasonably believes in a state of facts, that reasonable belief may be dispelled at any moment. Nobody could give an exhaustive statement of the ways in which a belief could be dispelled. The question in issue in the present case is whether the husband's belief must be taken to have been dispelled when a judgment of a court of competent jurisdiction has been given in favour of the wife to the effect that the husband has failed to prove a charge of adultery against her." That is the case as it stands now, but it was not the case as it stood before the justices gave their judgment, when the belief held the field, and a finding had not been made.

I am going to say only one other thing. In the judgment in *Glenister v. Glenister* I am reported as having said, in the opening of that part of the judgment which deals with the point in issue⁸: "That brings me to what I think is the only remaining point, and is, as things have turned out, the real crux of this case. It is whether, short of proving adultery against the wife, the husband has nevertheless shown, and ought to be held to have shown, that he had reasonable cause for withdrawing from cohabitation in the sense that he was not a deserter." I am later reported as saying⁹: "That the husband held that belief, and held it reasonably, I am prepared to hold in his favour. There remains the sole question whether that is enough. My own impression is that there is authority on the question of reasonable belief of adultery, but I cannot put my hand on it, and learned counsel have not been able to refer us to it, but the principle, I think, is really settled by two cases." I then refer to *Haswell v. Haswell*¹⁰ and *Ousey v. Ousey*,¹¹ and I do not propose to refer to them again; but I am now able to say that I know what were the authorities which I had in mind. They were *Morris v. Edmonds*¹² and *Biggs v. Burrridge*,¹³ the latter of which approves but distinguishes the case of *Morris v. Edmonds*.¹² It is only necessary to refer to *Morris v. Edmonds*,¹² and I do so because, although it was decided under the Vagrancy Act, 1824, it does, in substance, raise the exact point which is said to be left

⁷ [1949] P. 374.⁸ [1945] P. 30, 37.⁹ *Ibid.* 39.¹⁰ (1859) 1 Sw. & Tr. 502.¹¹ (1874) L.R. 3 P. & M. 223.¹² (1897) 77 L.T. 56.¹³ (1924) 89 J.P. 75.

undecided by *Glenister v. Glenister*¹⁴ and all the other cases in which *Glenister v. Glenister*¹⁴ has been followed. In *Morris v. Edmonds*¹⁵ the headnote reads as follows: "The respondent was "charged under section 3 of the Vagrancy Act, 1824, for that "he, being able to work and maintain himself and his wife and "family, 'wilfully refused or neglected' to do so. The magistrates found that he refused to maintain his wife because of the "bona fide belief that she had committed adultery, and that he "had offered under certain conditions to support his children. "They dismissed the summons, holding that under these circumstances the respondent had not 'wilfully refused or neglected.' "Held, that the magistrates were right." It is true that this was a case under the Vagrancy Act, 1824, but it has in common with the corresponding charge under the Married Women's code the element of wilfulness. It might be well just to read one paragraph in the case stated for the Queen's Bench Divisional Court, the paragraph which raises the point. The magistrates said: "Upon the facts hereinbefore stated we decided "that this was a case of bona fide mutual separation by "deed, and that the respondent had at the time of separation made provision for his wife and her children, and had "ceased to pay her in consequence of a bona fide belief that "she had committed adultery, and that the respondent had not "within the true meaning and intent of the Vagrancy Act wilfully "refused or neglected to maintain his wife and children, and that "he therefore was not guilty of the offence charged . . . , which "we therefore dismissed." It was argued that it was true that the committal of adultery had been held to be a defence, but that there was no direct authority that bona fide belief of adultery amounted to a defence. The court consisted of Collins and Ridley JJ., and the judgment was delivered by Collins J., who said¹⁶: "I am of opinion that we ought not to interfere with the "discretion of the magistrates. They heard and saw the parties, "and came to the conclusion that this was bona fide. I was "impressed at one time with the distinction of the fact of adultery, "and bona fide belief of adultery, but this is a proceeding not "to enforce maintenance, but a penal proceeding for an offence, "and so we must look and see if the respondent has 'wilfully' "refused to maintain. The authorities quoted establish that under "the circumstances of this case, the man cannot be described

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¹⁴ [1945] P. 30.¹⁶ Ibid. 57.¹⁵ 77 L.T. 56.

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“ as an idle and disorderly person. I think the decision of the
“ magistrates perfectly right, and this appeal must be dismissed.”

I agree that that is not directly in point because of such distinction as there is between the Vagrancy Act, 1824, and the Summary Jurisdiction (Married Women) code. Nevertheless it seems to me to be a very strong pointer, even if there were no others, to what our decision ought to be in regard to this charge of wilful neglect to provide reasonable maintenance. But, for my part, I think that in the circumstances of this case it is impossible to draw any sensible distinction between the application of the principle in *Glenister v. Glenister*,¹⁷ and the cases which followed and approved it, to the charge of desertion and to the charge of wilful neglect to maintain.

Although, therefore, the findings of fact on the justices' part are unimpeachable, they have misdirected themselves in law on the true application of those facts to the summons in respect of wilful neglect, and the appeal must, therefore, be allowed.

PEARCE J. I agree. The principle laid down in *Glenister v. Glenister*¹⁷ is decisive of this case. In view of the circumstances which led the justices, quite rightly, to dismiss the summons for desertion, it was not possible for them properly to find that there had been wilful neglect to maintain. Unless there is some agreement, made expressly or by implication between the parties, the duty to cohabit and the duty to maintain are co-extensive, and, in my opinion, where circumstances have excused the husband from his duty to cohabit he cannot be held guilty of wilful neglect to maintain.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Baylis, Pearce & Co., for W. W. Ellison, Barrow-in-Furness; Bell, Brodrick & Gray, for Pickavance & Heron, Barrow-in-Furness.*

J. B. G.

¹⁷ [1945] P. 30.

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Divorce—Desertion by wife—Condonation inapplicable to desertion—Isolated acts of sexual intercourse—Whether desertion terminated—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 1 (1) (b).

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Mar. 3, 4,
18, 19, 20;
Apr. 7.

Evershed M.R.,
Jenkins and
Hodson L.JJ.

A wife deserted her husband in July, 1944, and went to live with her mother. The husband visited her from time to time and two or three isolated acts of sexual intercourse took place between the spouses from December, 1949, to March, 1950, as a result of one of which a child was born. The animus deserendi of the wife never changed and on May 15, 1951, the husband petitioned for divorce on the ground of desertion. The commissioner dismissed the petition on the ground that the acts of sexual intercourse had put an end to the period of desertion and the wife's earlier desertion could not be revived by her continuing desertion after March, 1950. On appeal:—

Held, (1) that desertion as a ground for divorce differs from the other statutory grounds of adultery and cruelty, in that the offence founding the cause of action is not complete until the action is constituted, *i.e.*, the petition is presented. The conception of condonation either in strictness or by analogy has no application to the continuing matrimonial offence of desertion as defined in section 1 (1) (b) of the Matrimonial Causes Act, 1950. (2) That a resumption of cohabitation in the sense of the setting up of a matrimonial home together, accompanied by a common intention on the part of both spouses to do so, is necessary to end or interrupt desertion. Accordingly, sexual intercourse between a deserted and a deserting spouse unaccompanied by the setting up of any such home or by any intention to do so cannot end or interrupt the state of desertion whether the deserter is the husband or the wife and whether or not the intercourse leads to the birth of a child.

Rowell v. Rowell [1900] 1 Q.B. 9; *Mummery v. Mummery* [1942] P. 107; *Henderson v. Henderson* [1944] A.C. 49, and *Bartram v. Bartram* [1950] P. 1, considered and followed.

Viney v. Viney [1951] P. 457 considered and distinguished.

Direction of law laid down by Willmer J. in *Whitney v. Whitney* [1951] P. 250 approved.

Per Evershed M.R.: Common or mutual intention has nothing to do with condonation. The observations of Lord Merriman P. and Havers J. in *Viney v. Viney* [1951] P. 457 disapproved.

The decision of the commissioner reversed.

APPEAL from Judge Emlyn Jones sitting as a commissioner in divorce.

The husband and wife were married on July 2, 1939. On July 6, 1944, the wife left the husband and went to live with her mother. From July to October, 1944, the husband paid weekly

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visits to the wife in an endeavour to persuade her to return to him. He did not see his wife again until December, 1949, when he received a letter from her asking for money. As a result of that letter he went to see her and visited her at fortnightly intervals from December, 1949, to March, 1950; on each occasion he pressed her to return but she always refused. On two or three of those fortnightly visits he had sexual intercourse with her and as a result a child was born on December 6, 1950. The husband did not visit the wife again after March, 1950. On November 8, 1950, she wrote to him as follows: "Bob, it isn't any use asking me to live with you again because I have fully made up my mind I never will. It is nearly six years since you and I parted and I have never felt at any time as if I wanted to return to you. You know we never get on well together. The love was all on your side. I made a big mistake when I married you. I am sorry, but never ask me again. Goodbye."

On May 15, 1951, the husband presented this petition for divorce alleging that the wife had (within the term of section 1 (1) (b) of the Matrimonial Causes Act, 1950), deserted him without cause for a period of "at least three years" (namely, ever since July 6, 1944), "immediately preceding the presentation of the petition." The wife did not defend the petition. Of the husband's evidence the commissioner said: "The husband impressed me, and I place this on record, as a truthful and completely honest man, and he told me that even now he was anxious to effect a reconciliation with his wife. It is clear to me that he loved her and still does." The commissioner then proceeded: "Upon these facts I am satisfied and so hold that the wife was guilty of desertion on or about July 6, 1944. I am also satisfied that the state of desertion, thus commenced, continued up to the presentation of the petition in the ordinary sense of the word 'desertion.' That is to say, both the fact of separation and the necessary animus on the wife's part so continued. By 'separation' I mean here only that there was no full resumption of cohabitation in a matrimonial home. Of the wife's animus I need only say that I find that at no time since July, 1944, has she formed any intention to resume married life."

The commissioner dismissed the petition, since he felt himself bound by *Viney v. Viney*¹ to hold that the acts of intercourse had put an end to the period of desertion.

The husband appealed. The wife was not represented on the

¹ [1951] P. 457.

appeal and the court asked the Queen's Proctor to attend to assist the court.

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Richard Bingham and Sproule Bolton for the husband. The question here is whether two or three isolated acts of sexual intercourse without resumption of cohabitation puts an end to desertion, on the ground that thereby the deserted spouse has condoned the desertion. It is submitted that the doctrine of condonation has no application to desertion. In section 4 (2) (b) of the Matrimonial Causes Act, 1950, condonation is declared to be a bar to divorce on the ground of adultery or cruelty. Desertion is not referred to. The old practice with regard to condonation does not apply to the continuing and new matrimonial offence of desertion. In this case the intention of the deserting spouse is really what is material when he or she resumed sexual intercourse. Phrases often used in authorities relating to resumption of cohabitation are "bilateral act" and "bilateral intention." There can be no resumption of cohabitation without a mutual intention to resume cohabitation. The expressions referred to were used in *Bartram v. Bartram*² and *Mummery v. Mummery*.³ In the former of these cases there was clearly no mutual intention. It was a case in which the husband took the wife to live under his roof because she had nowhere else to go, but she refused to have sexual intercourse; see also *Lane v. Lane*.⁴ The expression is normally used of a husband who, with knowledge of the wife's unfaithfulness, resumes sexual intercourse. The question is whether sexual intercourse, which in the case of other matrimonial offences is a conclusive act of condonation, applies to terminate the period of desertion having regard to its continuing nature. Condonation has certain peculiar characteristics. It must proceed from the injured party and relate to past wrong. The conception is one not merely of forgiveness but of reinstatement. A letter expressing forgiveness can be retracted. The material feature of the termination of desertion is that it is the result of the act of the guilty party. It may be contrasted with condonation: *Henderson v. Henderson*.⁵ Further, condonation predicates a state of mind rather than a course of conduct.

Whether condonation applies to desertion must be considered in the light of authorities. There is nothing in *Henderson v. Henderson*⁵ relating to desertion, apart from a statement by Lord

² [1950] P. 1.³ [1942] P. 107.⁴ Ante, 34.⁵ [1944] A.C. 49.

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Simon L.C. that cohabitation shows that there is condonation of past wrongs. There is nothing else to suggest that it would apply to desertion, and probably he was there referring only to adultery and cruelty which can be condoned and later revived. The continuing nature of desertion precludes condonation. In *Whitney v. Whitney*⁶ the husband and wife spent some half-dozen weekends together in hotels, and Willmer J. held that there was no interruption of the wife's desertion. *Whitney v. Whitney*⁶ was overruled in *Viney v. Viney*.⁷

Restitution of conjugal rights before 1857 was the only remedy for desertion: Shelford on Marriage and Divorce, 1841 ed., p. 577. Against a claim for restitution there were only two pleas in bar, either the adultery of the other party or condonation. There is no indication that condonation was a plea in bar in the case of desertion. Condonation was a plea in bar to a suit for divorce a mensa et thoro before 1857, when it could be granted for adultery, cruelty or unnatural offences. [They referred to Oughton's *Ordo Judiciorum*, 1738 ed., vol. 1, p. 317, as a textbook crystallizing the law before 1857 and setting out the canon law.] Under the Matrimonial Causes Act, 1857, s. 7, divorce a mensa et thoro ceased and instead there was only an order for judicial separation, but the same rules were made applicable by section 22. Further, divorce a vinculo was then for the first time introduced. That was in effect divorce for adultery and it was only as to this that the question of condonation came in. There was later a type of desertion called statutory desertion. If the husband refused to obey a judicial decree to take back his wife and treat her as a wife, the wife could get relief. [They cited *Gill v. Gill*,⁸ as referred to in *Orme v. Orme*.⁹]

There is no authority for the proposition that desertion, a continuing offence, can be condoned: *Blandford v. Blandford*.¹⁰ In *Rowell v. Rowell*¹¹ Lord Russell of Killowen C.J. said that the test of separation was intention. Intercourse of itself did not establish an intention to resume cohabitation.

[They referred to *Paine v. Paine*¹²; *Williams v. Williams*¹³; *Cramp v. Cramp*¹⁴; *Williams v. Williams*¹⁵; *Abercrombie v. Abercrombie*¹⁶; *Green v. Green*¹⁷; *Fearn v. Fearn*¹⁸; *Bartram*

⁶ [1951] P. 250.⁷ [1951] P. 457.⁸ (1823) cited 2 Add. 384.⁹ (1824) 2 Add. 382, 384.¹⁰ (1883) 8 P.D. 19.¹¹ [1900] 1 Q.B. 9.¹² [1903] P. 263.¹³ [1904] P. 145.¹⁴ [1920] P. 158.¹⁵ [1939] P. 365.¹⁶ [1943] 2 All E.R. 465.¹⁷ [1946] P. 112.¹⁸ [1948] P. 241.

v. *Bartram*¹⁹; *Crowther v. Crowther*²⁰; *Maslin v. Maslin*²¹; *Lane v. Lane*.²²]

The case of *Viney v. Viney*,²³ by which the commissioner felt himself bound, is no authority in this case, since there the doctrine of condonation clearly applied because the petition was founded on adultery.

[They referred to the following United States decisions: *Kennedy v. Kennedy*²⁴; *Burk v. Burk*²⁵; *Dickerson v. Dickerson*,²⁶ and *Danforth v. Danforth*.²⁷]

Colin Duncan and *Brian Neill* for the Queen's Proctor as amici curiae. The short question at issue is whether a husband can successfully petition for divorce on the ground of the wife's desertion if within three years of the presentation of the petition he has had intercourse with her. The answer to that question depends on what a petitioner has to prove in order to get a divorce under section 1 (1) (b) of the Act of 1950 on the ground of desertion. The court has to consider whether, if a husband does acts which would have amounted to condonation if he were claiming a divorce on the ground of adultery, he is debarred from obtaining a decree on the ground of desertion. If the court is satisfied that there has been no interruption of the animus deserendi of the deserting spouse, is there any step which, if taken by the deserted spouse, will put an end to the desertion?

The offence of desertion is not defined in the Act of 1950. Nor is there any definition in the authorities. Lord Macmillan in *Pratt v. Pratt*²⁸ said that in order to obtain a divorce on the ground of desertion the petitioner had to prove desertion for three years without cause.

[They referred to the Summary Jurisdiction (Married Women) Act, 1895, s. 7; the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (2); the Matrimonial Causes Act, 1937, s. 6 (3), and the Matrimonial Causes Act, 1950, s. 7.]

To constitute desertion there must be both the factum of desertion and the animus deserendi. It is also material to consider the state of mind of the deserted spouse. A mutual agreement to separate cannot constitute desertion. The state of mind of the petitioner is relevant, since at all times up to the presentation of

¹⁹ [1950] P. 1.

²⁰ [1951] A.C. 723.

²¹ [1952] 1 All E.R. 477.

²² Ante, 34.

²³ [1951] P. 457.

²⁴ (1877) 87 Illinois Reports 250.

²⁵ (1883) 21 West Virginia Reports 445.

²⁶ (1919) State of Texas, 207 South Western Reporter 941.

²⁷ (1895) State of Maine, 33 Atlantic Reporter 781.

²⁸ [1939] A.C. 417, 420.

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the petition he must be ready and willing to take the deserting spouse back. To terminate desertion it is sufficient if the factum or the animus deserendi has gone. The onus of proving desertion is always on the petitioner. Acts of intercourse are evidence that the animus deserendi no longer exists. *Williams v. Williams*²⁹ is a case of resumption of cohabitation, not of condonation. The period of desertion must be continuous. Where a husband has sexual intercourse with his wife, he must be regarded as having affirmed the marriage and terminated the period of desertion.

[They referred to the following Australian decisions: *Andrews v. Andrews*³⁰; *Fairey v. Fairey*³¹; *Struthers v. Struthers*³²; *Timms v. Timms*³³; *Upton v. Upton*.³⁴] Those decisions show that in Australia the doctrine of condonation is not regarded as applying to desertion, and further that casual acts of sexual intercourse do not prevent the period of desertion running.

It is submitted that *Mummery v. Mummery*³⁵ was wrongly decided. A husband who has had intercourse with his wife cannot be heard to say that the animus deserendi of his wife continues. It is against public policy that a woman should be deemed to be in desertion when she has borne a child as the result of intercourse during the desertion period. The birth of a child is inconsistent with reprobating the marriage. [They referred to *Tilley v. Tilley*³⁶ and *Robison v. Gosnold*.³⁷]

Richard Bingham in reply. It would not be right for the legal consequences of sexual intercourse to depend on whether a child is born or not. Nor is the animus of the deserted spouse material. Throughout the period of desertion the deserted spouse must affirm the marriage. Sexual intercourse does not alter the animus of the deserted spouse. The commissioner having found here that there was no resumption of cohabitation and that the wife's intention never changed, the desertion was never terminated and it is submitted that the husband is entitled to a decree of divorce.

Cur. adv. vult.

April 7. The following judgments were read:—

EVERSHED M.R. stated the facts, and continued:—On these facts the commissioner felt himself bound, by the reasoning of the

²⁹ [1904] P. 145.

³⁰ [1938] St.R.Qd. 72.

³¹ [1947] S.A.S.R. 69.

³² [1943] S.A.S.R. 89.

³³ [1925] V.L.R. 597.

³⁴ [1919] V.L.R. 612.

³⁵ [1942] P. 107.

³⁶ [1949] P. 240.

³⁷ (1703) 6 Mod. 171.

Divisional Court in the case of *Viney v. Viney*,³⁸ to hold that the acts of intercourse had necessarily put an end to the period of desertion which had begun nearly six years before; and, further, that such earlier desertion could not be revived by the wife's continuing desertion after March, 1950, so as to enable the husband to allege at the date of his petition that the necessary requirements of section 1 (1) (b) of the Matrimonial Causes Act, 1950, had been satisfied. The commissioner was further of the opinion that the decision in *Viney v. Viney*³⁸ bound him to regard the case of *Whitney v. Whitney*,³⁹ relied on by the husband, as having been wrongly decided by Willmer J.

The question raised, it is clear, is one of difficulty and importance, and Mr. Bingham, for the husband, has in an argument, as thorough and careful as it has been cogent, reviewed the history of the law relating to condonation and to the matrimonial offence of desertion. He has invited us to conclude that, neither on authority nor on principle, is the former applicable to the latter, at least in a case where the alleged condonation has occurred before the presentation of the petition, that is, before the desertion has, by the necessary intendment of the statute, ripened, so to speak, into an offence entitling the deserted spouse to repudiate the marriage and pray for its dissolution.

The wife did not appear on the appeal, and we accordingly requested the Queen's Proctor to attend before us and assist the court by such arguments as he thought it proper to adduce. We are no less indebted to Mr. Colin Duncan for the arguments which he presented to us for the Queen's Proctor, and which were to the effect that the commissioner rightly dismissed the present petition.

Mr. Bingham, for whose skill and care I have already expressed my appreciation, will not, I hope, regard me as unkind if, before I deal with the arguments in the case, I first revert to a matter to which I drew attention during the argument, namely, the form of the questions put to the petitioner during his examination-in-chief. This examination-in-chief consisted from first to last of a series of questions put (without any comment or objection, be it said, by the judge) in a form so leading as might fairly be said to have deprived the answers (which consisted substantially of the word "Yes," varied occasionally by the phrase, "that is right") of any cogency whatever. I give a few examples which related to matters vital to the petitioner's case:

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³⁸ [1951] P. 457.³⁹ [1951] P. 250.

C. A. Question: "Was the object of your going to ask her to resume
 1952 "cohabitation?" Answer: "Yes." Question: "You asked
 PERRY "her on different occasions to come back?" Answer: "Yes."
 v. Question: "Was she adamant about her refusal?" Answer:
 PERRY. "Yes." Question: "In your mind I think you were wanting to
 Evershed M.R. "lead up to a reconciliation?" Answer: "That is right."
 Question: "At those meetings when you went to see her you
 "asked her on each occasion whether she would be willing to
 "come back to you?" Answer: "I did." Question: "On
 "each occasion did she point blank refuse?" Answer: "That
 "is right." Question: "You only had intercourse on two or
 "three occasions, although you saw your wife on a number?"
 Answer: "That is right."

I have referred to this matter in the hope that, since this case is likely to be regarded as of some significance, my judgment may prove an effective vehicle to convey to those concerned in the practice and administration of divorce—and I refer not only to counsel, but to judges—and particularly in cases where the petitions are undefended, that, when all allowance is made for the nervousness of witnesses, this form of questioning is not only undesirable but wrong, and is liable to disable any judgment founded on evidence so given.

I add, as regards the present case and as regards the view taken by the commissioner of the husband, that at the end of his examination by his counsel the commissioner asked the husband a number of questions himself upon the answers to which he obviously in large measure based his findings.

Desertion, which, if it had subsisted for the requisite period, was made a ground for dissolution of marriage by the Matrimonial Causes Act, 1937, was not an offence known to the ecclesiastical or common law founding a decree of separation. Before the Matrimonial Causes Act, 1857, the only remedy for desertion was a suit for restitution of conjugal rights. By the last mentioned Act, however, "desertion without cause for two "years and upwards" was made a ground whereon either spouse might obtain a decree of judicial separation; and desertion "without reasonable excuse" for a like period became, if coupled with adultery, a ground for dissolution of marriage at the suit of a wife. (See Rayden on Divorce, 5th ed., 99.) It is not in dispute that the period of desertion now required by the Matrimonial Causes Act, 1950 (which is in the same terms as that introduced into the Act of 1937) must be a single period continuing up to the date of presentation of the petition (in the latter

respect differing from the periods of desertion specified by the Act of 1857). Terms broken by one or more periods of resumed cohabitation which in total amount to three years or more will not suffice. In the present case, therefore, the five and three-quarters years of desertion from July, 1944, before the period of the acts of sexual intercourse are disqualified, since they did not end with the presentation of the petition; nor can the period from March, 1950 (after the acts of intercourse), to May 15, 1951 (which admittedly did so end, but is in duration but 13 or 14 months) be added to that which preceded the acts of intercourse.

It is therefore clear that desertion as a ground for divorce differs from the statutory grounds of adultery and cruelty in one important respect. The offence founding the cause of action is not complete, is (as it were) inchoate, until the action is constituted. If one spouse has committed adultery or has treated the other with cruelty, the latter has an accrued right to petition for divorce. He or she may at once repudiate the marriage and is no longer bound to affirm it and reinstate the offending spouse. The deserted spouse has no such right, no such election. If the deserting spouse genuinely desires to return, his or her partner cannot refuse reinstatement. It is, moreover (as Denning L.J. observed in *Bartram v. Bartram* ⁴⁰), contrary to public policy that the deserted spouse, desiring a resumption of cohabitation and bound to affirm the marriage, should be embarrassed in efforts for reconciliation.

It is because of these essential characteristics that, according to Mr. Bingham, what is known as "condonation" cannot be properly applicable to the offence of desertion prior to presentation of the petition. And Mr. Duncan has not indeed contended to the contrary. The burden of his argument is not that an act (or, as in this case, two or three acts) of sexual intercourse should be taken to amount to "condonation" by a husband of a deserting wife (involving directly or by analogy the conditions and consequences attaching to "condonation" as applied to adultery or cruelty) but rather that such an act or acts must involve necessarily such a resumption of cohabitation, of the marital relationship, that the preceding desertion is altogether ended and its consequences wiped away.

Notwithstanding Mr. Duncan's concession as regards "condonation" it will be necessary for me to consider its character and implication hereafter, having regard to the views expressed

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⁴⁰ [1950] P. 1.

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in *Viney v. Viney*.⁴¹ But it is convenient, first, to observe that it is clear—and also agreed between Mr. Bingham and Mr. Duncan—that “desertion” postulates both (i) the factum of separation and (ii) a continuing animus deserendi on the part of the deserting spouse. In light of the observations of the House of Lords (and particularly of Lord Macmillan) in *Pratt v. Pratt*⁴² it may also be relevant to consider the state of mind of the deserted spouse, here the husband. But in the circumstances of the present case, as found by the trial judge, nothing is added to the case by any such consideration. It follows, however, as Mr. Duncan emphasized, that the absence at any time of either the fact of separation or the intent to desert necessarily puts an end to the desertion; and, though the judge in this case found the wife’s animus deserendi to have continued without break up to May 15, 1951, it is Mr. Duncan’s case that the acts of intercourse that occurred are inconsistent with separation in fact or in law at the time they occurred.

The conception of condonation as understood in England is older than that of divorce according to statute, to which it is now related. Historically it could not have been applied to continuing desertion as a ground for divorce; but that is no necessary reason why it should not be applied now. It is unnecessary for me to refer to any of the older material to which Mr. Bingham drew attention; for the implications of condonation have recently been authoritatively stated, for example, by McCardie J. in *Cramp v. Cramp*⁴³ and (more particularly) by Viscount Simon L.C. in *Henderson v. Henderson*.⁴⁴ It involves, in the language of Lord Simon L.C.,⁴⁵ forgiveness confirmed or made effective by reinstatement. But by the law of England it is no less clearly established that the so-called “forgiveness” is conditional, conditional upon the “condoned” spouse thereafter fulfilling in all respects the obligations of marriage, so that if any matrimonial offence is afterwards committed by him or her—whether or not the same as that “condoned,” and whether or not in itself giving ground for divorce—the “condonation” ceases to have effect; the offence “condoned” and all its consequences are for all purposes “revived.” It was this characteristic which caused McCardie J. in *Cramp v. Cramp*⁴⁶ to observe that the word “forgiveness” (at

⁴¹ [1951] P. 457.

⁴² [1939] A.C. 417, 421.

⁴³ [1920] P. 158.

⁴⁴ [1944] A.C. 49.

⁴⁵ Ibid. 52.

⁴⁶ [1920] P. 158, 163.

least as it is understood in the Christian religion) was misleading as an interpretation of "condonation"; and that the real import of the latter was "a conditional waiver of the right of the injured spouse to take matrimonial proceedings." So in the present case Mr. Duncan was content to submit that by "condonation" was implied a "conditional sacrifice of an accrued right."

At any rate the notion of "forgiveness made effective by "reinstatement" implies, in my judgment, a right of election on the part of the injured spouse and does not fit the case of a deserted spouse who must always (until presentation of the petition at least) affirm the marriage and be ready to take back the deserting spouse. It is, moreover, naturally applicable to an act committed or to a course of conduct rather than to a state of mind (which is the second characteristic of desertion). Finally, the conditional quality of "condonation" and the liability of the condoned offence to be "revived" by subsequent misconduct cannot be made to fit with continuing but (as regards remedy) incomplete desertion; for it seems to be established that a period of desertion once terminated cannot afterwards be relied upon, when added to a later period of desertion or otherwise, to satisfy the requirements of section 1 (1) (b) of the Act of 1950. In this connexion it is to be noted that under the Act of 1857, where a husband had committed adultery and had also committed the offence of desertion without reasonable cause for two years, but the wife had condoned the adultery, subsequent matrimonial misconduct by the husband was held to revive not only the adultery but the desertion (*Blandford v. Blandford*⁴⁷).

Whatever, therefore, may be the situation where acts which in the case, for example, of adultery would have constituted condonation had taken place after presentation of a petition for divorce on the ground of desertion (as occurred in the recent case of *Maslin v. Maslin*,⁴⁸ upon which I express no opinion), the conception of condonation has, in my judgment, no application, either in strictness or by analogy (save perhaps indirectly to the extent later mentioned in regard to resumed cohabitation), to a current period of desertion. I do not forget that desertion, though of a character not sufficient to give grounds for divorce, is nevertheless a matrimonial offence. But even if such an offence could be said to be "condoned" by some act or conduct not involving a resumption of the marital relationship, such a condonation should be in principle "conditional" so that the offence would

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⁴⁷ (1883) 8 P.D. 19.⁴⁸ [1952] 1 All E.R. 477.

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 1952 *Blandford v. Blandford*,⁴⁹ and see, as regards the old so-called
 "statutory desertion," *Paine v. Paine* ⁵⁰).

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 Evershed M.R. It follows from what I have said that I have formed a view
 different from that which I understand to have been entertained
 by Lord Merriman P. and Havers J. in *Viney v. Viney*.⁵¹ For,
 although in reference to his own previous decision in *Mummery*
v. Mummery ⁵² Lord Merriman P. said ⁵³: "The question was
 "whether the desertion then established was interrupted or
 "alternatively condoned," he seemed to treat (as also did Havers
 J.) the matter afterwards as turning solely on condonation or to
 have regarded the two alternatives as being in truth the same.
 "The two things which," Lord Merriman P. said, "it is, in my
 "opinion, vital to remember in *Mummery v. Mummery* ⁵² . . .
 "are these: (1) that it was the wife who was the petitioner, not
 "the husband, and (2) that there was no bilateral intention to
 "resume cohabitation." He then refers to *Henderson v. Hen-*
derson,⁵⁴ observing that that case "re-emphasized in unmis-
 "takable manner the essential difference between the position of
 "a husband and the position of a wife in connexion with sexual
 "intercourse as proof of condonation."

On such a matter I express with the utmost diffidence a view
 different from that of Lord Merriman P. But, in my judgment,
 with the question, Aye or No, has there been condonation on the
 part of the injured spouse? "bilateral" (by which I understand
 is meant "common" or "mutual") intention has nothing to do.
 As the House of Lords decided in *Henderson v. Henderson*,⁵⁴
 sexual intercourse is conclusive proof of condonation of adultery
 by a husband who has knowledge of the adultery and, in the
 absence of fraud by the wife, whatever may have been in fact
 the intention of either spouse. That it may not be so in the case
 of an injured wife depends on the proposition that the situations
 of a husband and wife are not entirely the same. Historically
 they plainly were not; and modern legislation may be said not
 effectively to have been capable of eliminating all biological
 differences. Still, the difference in situation is not obvious in a
 case where the wife has voluntarily left her husband and has for
 years been living entirely separate from, and independent of, him.

I add that my conclusion is, as I think, reinforced by the
 circumstance that by section 4 (2) (b) of the Act of 1950

⁴⁹ 8 P.D. 19.

⁵⁰ [1903] P. 263.

⁵¹ [1951] P. 457.

⁵² [1942] P. 107.

⁵³ [1951] P. 457, 460.

⁵⁴ [1944] A.C. 49.

condonation of adultery or cruelty is expressly made a bar to a decree, but there is no reference to condonation in relation to desertion (as there is not, though the reason may be different, in relation to continuing unsoundness of mind made a ground of divorce by section 1 (1) (d)). It is true that there is no reference to condonation as regards a petition by the wife on the ground that her husband has been guilty of rape, sodomy or bestiality. But in those cases condonation may clearly be made applicable by analogy; and in any case condonation was regarded by the ecclesiastical courts prior to 1857 as a bar to divorce *a mensa et thoro* on the ground of bestiality no less than on the grounds of adultery or cruelty.

There remains, however, the question—the main argument, as I have stated, of Mr. Duncan—whether an act of sexual intercourse, or at least two or three acts such as were proved in the present case, should not be treated (against a husband petitioner) as constituting such a resumption of the marital relationship as puts a stop, for good and all, to the precedent period of desertion by the wife.

There is no doubt (as I have earlier stated) that resumption of marital relationship or resumption of cohabitation (for this purpose I treat the two formulae as synonymous) puts an end to desertion. The proposition has been clearly recognized by Parliament. See, for example, Summary Jurisdiction (Married Women) Act, 1895, s. 7; Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (2); Matrimonial Causes Act, 1937, s. 6 (3), re-enacted by Matrimonial Causes Act, 1950, s. 7 (3). Approaching the matter as *res integra* and without regard to authority, I should have thought that the question whether cohabitation or marital relationship has or has not been resumed is a question of fact and degree to be determined according to common-sense principles. Sexual intercourse is beyond doubt a most important incident in the relationship, though its significance will obviously vary, for example, according to the age of the spouses. Still, I should not have thought (again treating the matter without reference to authority) that an act or two or three acts of intercourse without more could sensibly be regarded as necessarily determining the question; and I should also have thought that mutual (or “bilateral”) intention was in this matter essential. Without attempting a definition, the implication of desertion is a rejection of all the obligations of marriage. It has been held by the House of Lords (in *Weatherley v.*

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C. A. *Weatherley* ⁵⁵) that absolute refusal of sexual relations by one spouse, who in other respects fulfils the duties of marriage, could not amount to desertion; and, if this is so, it does not seem to me shocking or unreasonable that participation in one or two acts of intercourse by a husband or wife, who in all other respects repudiated the marital relationship, should not be regarded as necessarily constituting a resumption of that relationship. If this view be right, then on the facts found in the present case I should conclude that there had been no such resumption.

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In my judgment the *prima facie* view which I have expressed is supported by the authorities. More particularly I think that, upon authority, mutual intention is of the essence of the matter. Lord Merriman P. so stated in *Mummery v. Mummery*,⁵⁶ and his view was expressly confirmed by the Court of Appeal in *Bartram v. Bartram*.⁵⁷ In that case Bucknill L.J. said ⁵⁸: “ But, in the “ present case, the husband has established actual desertion by “ the wife for many months. That being so, it seems to me that “ the husband is entitled to say that the desertion, once estab- “ lished, continues until it is proved that it has been brought to “ an end. The wife did not suggest at any time that she had “ brought it to an end. The question is, do the facts proved “ establish that it was brought to an end? In my view, it can “ only be brought to an end if the facts show an intention on the “ part of the wife to set up a matrimonial home with the husband, “ quoting the words of the President in the two cases to which “ I have referred. If the facts do not establish any intention on “ the part of the wife to set up a matrimonial home, the mere “ fact that, as a lodger, she came to live under the same roof as “ her husband, because she had nowhere else to go, does not “ remove the desertion which she had already started and which “ continued to run.”

According to Asquith L.J.⁵⁹: “ Having regard to those and “ other proved circumstances in the case, it seems to me wrong “ to hold that the three years’ period was interrupted by any “ resumption of cohabitation, for such resumption involves, in “ the language of Lord Merriman P. in *Mummery v. Mummery*,⁶⁰ “ cited by my Lord, a bilateral intention on the part of both “ spouses to set up a matrimonial home together. In my view, “ the facts proved in this case negative any such intention on the “ part of the wife who was not a free agent, but was acting under

⁵⁵ [1947] A.C. 628.⁵⁸ *Ibid.* 5, 6.⁵⁶ [1942] P. 107.⁵⁹ *Ibid.* 6.⁵⁷ [1950] P. 1.⁶⁰ [1942] P. 107.

“the spur of necessity.” I have already referred to the judgment to the like effect of Denning L.J. *Bartram v. Bartram*⁶¹ is binding upon this court and upon principle, in my view, concludes the present case in the husband’s favour.

We were referred to a number of other cases, but none of them, in my judgment, so qualifies the effect of *Bartram v. Bartram*⁶¹ as to compel me to hold that the acts of intercourse proved in the present case must be treated, as against the husband, as conclusive of the resumption of the marital relationship. That such acts will be evidence of such a resumption I do not doubt, and it may even be (upon an analogy to this limited extent from condonation) that they will weigh somewhat more heavily against a husband than a wife. But mutual intention must, in my view, upon proper evidence be proved, and I find no authority, *pace* the Divisional Court in *Viney v. Viney*,⁶² that there is as regards desertion some strict rule which distinguishes the case of a petition by a husband from that of a petition by a wife and compels the court to conclude against the former if any act of sexual intercourse has (with knowledge and in the absence of fraud) been proved. The decision in *Abercrombie v. Abercrombie*⁶³ by no means turned on the fact that there had been acts of sexual intercourse, but rather upon the fact that, to such extent as the limitations of the circumstances imposed upon them, the two spouses had in truth resumed matrimonial relationship. In the case of *Robison v. Gosnold*⁶⁴ Holt C.J. expressed the opinion that an act of intercourse with a wife who had deserted reimposed upon a husband liability for her debts. But the opinion was obiter and given long before desertion for a period continuing to the date of presentation of the petition was made a ground of divorce. In *Rowell v. Rowell*⁶⁵ the question was of a somewhat different character, whether the essential condition of a deed of separation had been determined by what Lord Russell C.J. (presiding in this court) called “casual and intermittent intercourse.” The court answered the question negatively and the reasoning at least lends, in my judgment, and has been regarded as lending, support to the view at which I have arrived.

Though I have ventured to differ from certain of the views expressed by the Divisional Court in *Viney v. Viney*⁶⁶ (which was an adultery case), I must not be taken to be suggesting that upon its facts that case was wrongly decided, nor to be deciding

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⁶¹ [1950] P. 1.⁶² [1951] P. 457.⁶³ [1943] 2 All E.R. 465.⁶⁴ 6 Mod. 171.⁶⁵ [1900] 1 Q.B. 9.⁶⁶ [1951] P. 457.

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that also upon its facts Willmer J. rightly decided the case of *Whitney v. Whitney*⁶⁷; but I am unable to agree with the Divisional Court that in the last-named case Willmer J. misdirected himself upon the law.

There remains Mr. Duncan's point that—particularly having regard to the birth of the child in December, 1950—it is contrary to common sense to suppose that at the time of the proved acts of intercourse and of the conception of the child its parents were separated in fact and truth. I am unable to agree. If the right view is that there must be some reality of resumed cohabitation to stop the running of desertion, common sense is by no means offended by my conclusion. The question is of the inference to be drawn from acts of intercourse: to that question the birth of the child appears to me to be an irrelevant misfortune. The quality of the acts of intercourse cannot be affected by the accident of their result. Nor can I think that it would as a matter of public policy be desirable that matters of this kind should involve possible questions of dispute about the use of contraceptives.

The industry of counsel enabled them to put before us references to the relevant law in the United States of America and Australia, and out of respect to that industry I should like to conclude this (already overlong) judgment by some references to that law. In America the matter seems to be regarded as doubtful. In *Corpus Juris Secundum*, it is stated (vol. 27, s. 59): "Offenses which may be condoned. It has been held that the doctrine of condonation applies to all charges of matrimonial misconduct, although it has also been held that the doctrine is inapplicable to causes of a continuing character. Condonation has been held to apply to adultery and to desertion." See also Bishop's Law of Marriage and Divorce (1891 ed., s. 1773).

Of the cases cited, *Danforth v. Danforth*,⁶⁸ *Kennedy v. Kennedy*,⁶⁹ and perhaps *Dickerson v. Dickerson*,⁷⁰ support the view which I have expressed. On the other side is the case of *Burk v. Burk*,⁷¹ decided in West Virginia in 1883. But it may be said that the judges in the last case were expressing the strong view then held in that State as regards all divorce.

The President, Johnson, of the court began his judgment: "This will be the first reported divorce case in this State. We

⁶⁷ [1951] P. 250.⁶⁸ State of Maine, 33 Atlantic Reporter 781.⁶⁹ State of Illinois, 87 Illinois Reports 250.⁷⁰ State of Texas, 207 South Western Reporter 941.⁷¹ 21 West Virginia Reports 445, 453.

“ would gladly wish, that it might be the last.” The material part of his judgment is as follows: “ To constitute ‘ desertion ’ within the meaning of the statute, there must be a combination of two things: an intention to desert, and an actual breaking off of the matrimonial cohabitation. The matrimonial cohabitation cannot be broken off by the mere fact of living in separate houses, while the husband constantly or at any time occupies the marriage-bed. If such a thing could be for a moment tolerated, then a man would have a legal warrant for the space of three years to make his wife his mere mistress, an act as shocking to the law as it is to morality and religion.”

Of the Australian cases cited, in *Andrews v. Andrews*,⁷² decided by the full court of Queensland; and in *Upton v. Upton*⁷³ and *Timms v. Timms*⁷⁴ (both before the full court of Victoria), the husband was in each case the deserter. The decisions were uniformly to the effect that the desertion was not stopped or condoned by “ casual ” acts of intercourse on the ground that the matrimonial relationship had not thereby been re-established. In the South Australian case of *Struthers v. Struthers*⁷⁵ the question did not directly arise, since there had been clearly a resumption of full cohabitation. But Sir Mellis Napier C.J., in delivering the judgment of the full court, referred to the other Australian cases, apparently without disapproval and without distinguishing between the cases of a deserting husband and a deserting wife. “ We have referred to the cases which show that desertion is not terminated or interrupted by casual acts of intercourse or casual visits, without any return to the routine of common life or anything resembling ‘ the re-establishment of ‘ the matrimonial relationship ’: *Timms v. Timms*.⁷⁶ There may be condonation which is not followed by cohabitation, and it would be contrary to public policy to treat a casual return, for the purpose of exploring the possibilities of reconciliation, as a resumption of cohabitation ”—language anticipating that used seven years later by Denning L.J. in *Bartram v. Bartram*.⁷⁷

On the other hand, in the later South Australian case of *Fairey v. Fairey*,⁷⁸ Reed J. held that in the case of a deserting wife a single act of intercourse amounted to condonation on the husband’s part. He relied, however, upon the fact that by the express terms of section 11 of the South Australian Matrimonial Causes

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⁷² [1938] St.R.Qd. 72.⁷³ [1919] V.L.R. 612.⁷⁴ [1925] V.L.R. 597.⁷⁵ [1943] S.A.S.R. 89, 92.⁷⁶ [1925] V.L.R. 597.⁷⁷ [1950] P. 1.⁷⁸ [1947] S.A.S.R. 69.

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Act condonation is applicable, indifferently, to all grounds of divorce, thereby distinguishing his case from the cases decided in Victoria where by the local Marriage Acts condonation is not expressly made a ground for refusing a decree in a suit for divorce based only on desertion. *Fairey v. Fairey*⁷⁸ is thus no less inapplicable to a case decided under the Matrimonial Causes Act, 1950, of this country.

It appears, therefore, that the weight of the American and Australian authority cited to us is consonant with the view which is, in my judgment, correct in principle and which in any case *Bartram v. Bartram*⁷⁹ binds us to adopt.

For the reasons which I have stated, I think that the appeal should be allowed and that the petitioner is entitled to his decree.

JENKINS L.J. This being an undefended case the evidence comprises only the barest outline of the facts elicited (as is unfortunately too often the case in undefended causes) from the petitioner husband largely by leading questions; but as found by the commissioner they are to the effect that the respondent wife deserted the petitioner husband without cause on July 6, 1944; that during the period from July to October, 1944, the husband paid weekly visits to the wife in an endeavour to persuade her to return to him; that no sexual intercourse took place between them during this period; that he did not see the wife at all from October, 1944, to December, 1949; that in December, 1949, he received a letter from the wife asking for money; that as a result he visited the wife approximately once a fortnight at her mother's house from December, 1949, to March, 1950; that on each of these fortnightly occasions he asked her to return to him but she refused; that on two or three of these fortnightly occasions he had sexual intercourse with her, the last act of intercourse taking place at the end of February or the beginning of March, 1950; that on November 8, 1950, he received a letter from her (which he produced) to the effect that she would never live with him again; that, as the result of the acts of intercourse I have mentioned, the wife became pregnant, and a son of the marriage was born on December 6, 1950.

The commissioner formed a most favourable view of the husband as a truthful and completely honest man; and his conclusion on the facts was that the wife was entirely to blame, and was guilty on July 6, 1944, of desertion which "continued up to the

⁷⁸ [1947] S.A.S.R. 69.

⁷⁹ [1950] P. 1.

"presentation of the petition in the ordinary sense of the word
 "desertion. That is to say both the fact of separation and the
 "necessary animus on the wife's part so continued." He added:
 "By 'separation' I mean here only that there was no full
 "resumption of cohabitation in the matrimonial home. Of the
 "wife's animus I need only say that I find that at no time since
 "July, 1944, has she formed any intention to resume married
 "life."

But after considering the authorities bearing upon the question whether sexual intercourse between spouses during the period of three years immediately preceding the presentation by one of them of a petition for divorce based on desertion under section 1 (1) (b) of the Matrimonial Causes Act, 1950, precludes the granting of a decree on that ground, the commissioner regarded himself as bound, by what was said in the House of Lords in *Henderson v. Henderson*⁸⁰ as to the irrevocable effect of condonation by intercourse on the husband's part, having regard also to the reasoning of the Divisional Court in *Viney v. Viney*⁸¹ and the disapproval therein expressed of *Whitney v. Whitney*⁸² (where a husband was granted a decree notwithstanding intercourse with the deserting wife within the three-year period) to dismiss the petition, which he accordingly did.

From that decision the husband now appeals, and the questions to be considered are substantially: (1) whether the mere fact of sexual intercourse between a deserted and a deserting spouse, without anything more towards the resumption of cohabitation in the full sense, is consistent with the continuance of the state of desertion, and therefore does not preclude the granting to the deserted party of a decree based on three years' desertion upon a petition presented within three years after such intercourse (a) if the deserted party is the husband, and (b) if the deserted party is the wife; and (2) whether the doctrine of condonation or some analogous principle applies to the matrimonial offence of desertion as defined in section 1 (1) (b) of the Matrimonial Causes Act, 1950, so as to make sexual intercourse between spouses within the three-year period an absolute bar to a decree founded upon desertion for that period, at all events where the deserted party is the husband.

Apart from authority, I, speaking for myself, would have been disposed to regard sexual intercourse between a deserted and a deserting spouse as in itself essentially inconsistent with the

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⁸⁰ [1944] A.C. 49.⁸² [1951] P. 250.⁸¹ [1951] P. 457.

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continuance of the state of desertion between them, and thus interrupting the statutory period of desertion, whether the deserted party was the husband or the wife. There is to my mind an element of repugnancy in the conception of a husband and wife, while in the act of having sexual intercourse with each other as husband and wife, being nevertheless in a state of desertion. It is well settled that cohabitation without actual sexual intercourse may condone adultery, whereas sexual intercourse with knowledge of the facts does in itself inevitably condone it (at all events where the husband is the injured party) even if there is nothing more in the way of resumption of cohabitation in the full sense. It seems to me *prima facie* unreasonable that an act, which is accorded such a decisive effect as an affirmation by the injured party of the married state for the purposes of condonation, should be able to take place consistently with the uninterrupted continuance of a state of desertion, which, while it continues, amounts to a negation of the married state. Suppose the case of a wife who is in desertion and has committed adultery. With knowledge of the adultery the husband seeks her out and has intercourse with her. This is decisive as a condonation of, and affirmation of, the marriage notwithstanding the adultery. The husband, by his conduct, has taken his wife back as his wife, adulteress though she has been. How can it consistently be said that, although he has taken her back and reinstated her as his wife, she has not come back to him, but has been continuously, even during the decisive act of intercourse, in a state of desertion from him?

This illustration, at all events where the husband is the deserted party, reinforces the conclusion to which, apart from authority, I would, speaking for myself, be disposed to come, that sexual intercourse between a deserted and a deserting spouse, even when unaccompanied by resumption of cohabitation in other respect, puts an end to or interrupts the period of desertion.

In other words, I would, speaking for myself, be inclined, apart from authority, to hold that while desertion is terminated by resumption of cohabitation in the full sense, it does not follow that desertion can only be terminated by such resumption; and that sexual intercourse in itself irrespective of any resumption of cohabitation in other respects does suffice to terminate it, as being essentially inconsistent with the continuance of a state of desertion. I would add that my inclination so to hold would be stronger in the case of a deserted husband than in the case of a deserted wife by reason of the more cogent application to the

case of a deserted husband of the comparison I have sought to draw with the effect of sexual intercourse for the purposes of condonation.

The question is, however, by no means free from authority, and, thanks to the industry of counsel, we have been referred to a large number of cases (including several from the United States of America and Australia) bearing directly or indirectly upon it. I do not propose to embark on any protracted review of all these decisions, as reference to only a few of them will suffice to indicate the course which, in my judgment, this court is bound by authority to take.

I will begin with *Rowell v. Rowell*,⁸³ where it was held by this court that the fact that intercourse had taken place between spouses living apart under a deed of separation was not of itself conclusive evidence that the separation had come to an end so as to make the deed of no effect, or, in particular, so as to put an end to the husband's obligation under the deed to pay a weekly sum to the wife during their joint lives, if they should so long live separate from one another. Although that case was concerned with a contractual separation under a deed, and not with desertion, and the question therefore was whether, by reason of the mere fact of sexual intercourse, unaccompanied by any resumption of cohabitation in other respects, the parties had ceased to "live separate and apart from each other" within the meaning of the deed, there is no doubt that it has been regarded as authority for the proposition that sexual intercourse between a deserted and a deserting spouse does not of itself put an end to desertion.

In *Mummery v. Mummery*⁸⁴ Lord Merriman P., founding himself to a great extent on *Rowell v. Rowell*,⁸⁵ held that a single act of intercourse between a deserted wife and a deserting husband consented to by the wife in the hope of effecting a reconciliation with the husband, who for his part never intended to live with her again, and in fact left her the next morning and never returned, did not operate as a condonation of the desertion prior to the act of intercourse, or break the continuous desertion for upwards of three years immediately preceding the presentation of the wife's petition.

Lord Merriman P. said⁸⁶: "A resumption of cohabitation in "the full sense of the word puts an end to a state of desertion, "and that not merely because it condones the previous desertion

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⁸³ [1900] 1 Q.B. 9.⁸⁵ [1900] 1 Q.B. 9.⁸⁴ [1942] P. 107.⁸⁶ [1942] P. 107, 109.

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“ for whatever time that offence has lasted, but also because a
 “ resumption of cohabitation is the exact negation of a state of
 “ desertion. The two things cannot exist together. It is clear
 “ that, apart from whatever may be the legal effect of what
 “ happened on the night which the husband and the wife spent
 “ together, the husband had not the slightest intention of
 “ resuming cohabitation in the ordinary sense of the word, and
 “ on any view of the matter, even assuming that I am bound
 “ to hold that cohabitation was resumed or that the offence had
 “ been condoned on that occasion, it is plain that the husband
 “ resumed a state of desertion the next day. Did the fact that
 “ the husband and wife for that night resumed marital relations
 “ in the usual sense constitute a resumption of cohabitation so
 “ as to condone the previous desertion and bring the state of
 “ desertion to an end? If the fact that sexual intercourse took
 “ place between the parties is conclusive, there is nothing more
 “ to be said. The wife does not suggest that her consent to that
 “ act was obtained by fraud, so that the issue raised in *Roberts*
 “ v. *Roberts and Temple* ⁸⁷ does not arise. The whole question
 “ turns on what a resumption of cohabitation means. Lord
 “ Merrivale said more than once that no judge has ever attempted
 “ to give a comprehensive definition of desertion and that prob-
 “ ably no judge would ever succeed in doing so, but among the
 “ descriptions of desertion which he gave was one which has
 “ always appealed to me. He said that desertion was a with-
 “ drawal not from a place, but from a state of things: *Pulford*
 “ v. *Pulford*.⁸⁸ Similarly, I doubt whether any judge could give
 “ a completely exhaustive definition of cohabitation, and cer-
 “ tainly I am not going to attempt to do so, but at least a
 “ resumption of cohabitation must mean resuming a state of
 “ things, that is to say, setting up a matrimonial home together,
 “ and that involves a bilateral intention on the part of both
 “ spouses so to do. Does intercourse on a single night in the
 “ circumstances of this case raise an irrebuttable presumption
 “ that the parties have resumed cohabitation even for that brief
 “ time? Put in another way, does it raise an irrebuttable pre-
 “ sumption that the wife, in consenting to that intercourse, has
 “ condoned the previous desertion? I think it would lead to an
 “ absurd state of things if one were bound so to hold.”

After describing as “ praiseworthy ” every legitimate attempt
 by a wife to regain her husband’s affection, and pointing out that

⁸⁷ (1917) 33 T.L.R. 333.

⁸⁸ [1923] P. 18, 21.

the mere occurrence of meetings arranged with a view to effecting a reconciliation obviously would not compel the court to hold that the state of desertion was brought to an end, he continued: "Why then should a wife who goes a step further in the hope of effecting a reconciliation and allows her husband to sleep the night with her be held to have condoned the offence and to have resumed cohabitation when it is clear beyond doubt that the husband had no intention of resuming cohabitation? I do not think that I am obliged so to hold. In my view, the law is that, as regards the wife at any rate, an act of sexual intercourse is not conclusive on the question of condonation, and that it does not raise an irrebuttable presumption that cohabitation has been resumed. I think I am justified in so holding, if not obliged so to hold, on the authority of *Rowell v. Rowell*.⁸⁹"

Lord Merriman P. then proceeded to cite at some length from the judgments in that case and expressed his conclusion thus: "... I think that I am justified in holding here that there has neither been condonation nor a resumption of cohabitation which interrupts the necessary period of desertion, and that, therefore, the wife is entitled to a decree nisi, with costs."

The judgment in *Mummery v. Mummery*⁹⁰ received the unqualified approval of this court in *Bartram v. Bartram*,⁹¹ and must therefore be regarded as an authority binding on us, and it seems to me to establish the proposition that, in order to terminate or interrupt the state of desertion between a deserted and a deserting spouse, there must be a resumption of cohabitation, that is to say, the setting up of a matrimonial home together pursuant to a "bilateral," which I take to mean a "common" or "mutual," intention to do so.

Indeed, in *Bartram v. Bartram* Denning L.J. went further and said⁹²: "... I would say in such a case the period of desertion does not cease to run unless and until a true reconciliation has been effected. Any other view would greatly hamper attempts at reconciliation, because it would mean that the deserted party would be disinclined to take the other back for fear of losing his legal rights in case the attempt at reconciliation was unsuccessful."

It seems to me necessarily to follow that the mere acts of sexual intercourse between a deserted and a deserting spouse, not accompanied by any setting up of a matrimonial home

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⁸⁹ [1900] 1 Q.B. 9.⁹¹ [1950] P. 1.⁹⁰ [1942] P. 107.⁹² Ibid. 7.

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together or by any intention on the part of the deserting spouse to do so, do not terminate or interrupt the state of desertion.

In *Mummery v. Mummery*⁹³ Lord Merriman P. was careful to preserve the possible distinction between the case of a deserted wife (which was then before him) and the case of a deserted husband, having in mind, no doubt, the question of condonation (to which I will return) and the much greater weight attributable to sexual intercourse as condonation by a husband than as condonation by a wife. But for my part, if I have rightly stated the ratio decidendi in *Mummery v. Mummery*,⁹³ as expressly approved in *Bartram v. Bartram*,⁹⁴ it seems to me (setting aside for the moment the question of condonation) to leave no room for any such distinction. If what is indispensably necessary to end or interrupt desertion is the resumption of cohabitation in the sense of the setting up of a matrimonial home together, accompanied by a common intention on the part of both spouses to do so, then mere sexual intercourse between a deserted and a deserting spouse unaccompanied by any such setting up, or common intention to do so, cannot end or interrupt the state of desertion whether the deserter is the husband or the wife, and whether or not the intercourse leads (as in the present case) to the birth of a child.

In *Whitney v. Whitney*⁹⁵ Willmer J., following *Bartram v. Bartram*⁹⁶ and *Mummery v. Mummery*,⁹⁷ held a husband entitled to a decree on the ground of desertion by his wife for the statutory period of three years notwithstanding sexual intercourse with his wife on some half-dozen occasions during that period, the intercourse having taken place on week-end visits made by the husband to the wife in attempts to effect a reconciliation, and the wife on her part never having had any intention of setting up a matrimonial home, but having, on the contrary, since her initial act of desertion, maintained her determination to live separate and apart from her husband. Subject to what I will say below on the question of condonation, I think that on the authorities Willmer J. was right in so holding.

In *Viney v. Viney*,⁹⁸ however, a Divisional Court, consisting of Lord Merriman P. and Havers J., disapproved *Whitney v. Whitney*⁹⁹ on the ground that the husband in that case must be taken to have condoned the desertion, and referred at some

⁹³ [1942] P. 107.

⁹⁴ [1950] P. 1.

⁹⁵ [1951] P. 250.

⁹⁶ [1950] P. 1.

⁹⁷ [1942] P. 107.

⁹⁸ [1951] P. 457.

⁹⁹ [1951] P. 250.

length to the restatement of the doctrine of condonation and the conclusive effect for that purpose of sexual intercourse on the part of an injured husband contained in the speech of Lord Simon L.C. in *Henderson v. Henderson*.¹ Both *Henderson v. Henderson*¹ and *Viney v. Viney*² were cases of adultery, the application to which of the doctrine of condonation in the strict sense is, of course, undoubted. The same can, in my view, however, by no means be said in relation to desertion of the kind here in question, that is, the continuing and, so to speak, ambulatory offence of desertion for a period of at least three years immediately preceding the presentation of the petition, which can never become complete until the petition is actually presented, as distinct from (for example) the desertion by a husband for a period of two years (completed at any time) which under section 27 of the Matrimonial Causes Act, 1857, in conjunction with the husband's adultery entitled the wife to a divorce, and which, as appears from *Blandford v. Blandford*,³ could be the subject of condonation and revival. Clearly, unless the doctrine of condonation or some analogous principle is applicable to the new statutory offence of desertion for the period of three years immediately preceding the presentation of the petition, the strictures passed in *Viney v. Viney*,⁴ on the decision in *Whitney v. Whitney*,⁵ are not well founded.

This brings me to the consideration of the second of the two questions stated earlier in this judgment, that is, whether the doctrine of condonation or some analogous principle does apply to desertion as defined in section 1 (1) (b) of the Matrimonial Causes Act, 1950.

Mr. Colin Duncan, who appeared on behalf of the Queen's Proctor for the assistance of the court, and on the first question supported in argument substantially the view above expressed as the view I would myself, apart from authority, have been disposed to prefer, did not contend as regards the second question that the doctrine of condonation, in the strict sense, applies to desertion as defined in section 1 (1) (b), and, in my view, the difficulties in the way of so applying it are really insuperable.

I will not attempt to add any definition of my own to the various statements of the doctrine of condonation to be found in the authorities. But I think it may, at all events, be said that condonation properly so called does, at all events, involve

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¹ [1944] A.C. 49, 52.² [1951] P. 457.³ 8 P.D. 19.⁴ [1951] P. 457.⁵ [1951] P. 250.

C. A. (i) an election by the injured spouse to affirm the marriage notwithstanding the condoned offence, and (ii) the possibility of revival of the condoned offence by any further matrimonial offence on the part of the guilty spouse.

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Now it is the essence of the offence of desertion that the deserted spouse should all the time be affirming the marriage; otherwise desertion ceases and becomes (in effect) separation by consent. There is thus no question of election on the part of the deserted spouse to affirm or disaffirm it. He or she has no option but to affirm. Further, the offence of desertion for a period of three years immediately preceding the presentation of the petition, once condoned, could never be revived, because the continuous period of desertion required by the statute would be irretrievably broken. For these reasons it seems to me that the doctrine of condonation in its strict sense is inappropriate and inapplicable to the offence of desertion as defined in section 1 (1) (b) of the Act of 1950.

Mr. Colin Duncan did, however, submit, and I confess I was attracted by the submission, that by analogy to the doctrine of condonation in the strict sense a deserted spouse (or at all events a deserted husband) who chooses to have sexual intercourse with the deserter must be treated as having conclusively affirmed the marriage and waived or remitted the deserting spouse's desertion for any period preceding the act of intercourse.

But in the end I find myself forced to the conclusion that this view cannot stand consistently with the ratio decidendi in *Mummery v. Mummery*⁶ as approved in *Bartram v. Bartram*.⁷ If sexual intercourse without resumption of cohabitation in other respects does not put an end to or interrupt the state of desertion, then the state of desertion and the offence of the deserting party continues notwithstanding the intercourse, and there is no room for the application of the doctrine of condonation or any analogous principle. To apply it would be as much as to say either that the state of desertion can be brought to an end and can be interrupted, by sexual intercourse alone without any setting up by the spouses of a matrimonial home together, and without any mutual or common or bilateral intention to do so (which the ratio decidendi in *Mummery v. Mummery*⁸ as approved in *Bartram v. Bartram*,⁹ in my view, forbids); or else that the offence of desertion can be condoned, although it continues

⁶ [1942] P. 107.

⁷ [1950] P. 1.

⁸ [1942] P. 107.

⁹ [1950] P. 1.

without a break before, during and after the act relied on as constituting condonation (which seems to me impossible).

Accordingly, in deference to the authorities rather than by my own inclination, I would allow this appeal.

HODSON L.J. The question of law which falls to be determined is whether a husband, who has been deserted by his wife, can succeed in a petition for divorce if during the three years before the petition he has had sexual connexion with her. This question was answered in the negative by the commissioner, who, in doing so, followed the dicta of Lord Merriman P. and Havers J. in *Viney v. Viney*,¹⁰ which disapproved a decision of Willmer J. in *Whitney v. Whitney*,¹¹ where the same question was answered in the affirmative.

The reasoning upon which Lord Merriman P. founded himself is plain and logical. Desertion is a matrimonial offence. A husband who has sexual relations with his erring spouse with knowledge thereof cannot be heard to say that he has not condoned the offence: *Henderson v. Henderson*.¹² Therefore desertion prior to sexual relations is manifestly condoned by a husband. This is so, although in the case of a wife who has been deserted and submits to the embraces of her husband in an endeavour to secure his return condonation will not inevitably be found against her, if she seeks to rely on a period of desertion before as well as after such an event: see *Mummery v. Mummery*.¹³ This conclusion is permissible since the doctrine of condonation where a wife submits to her husband, he being the wrongdoer, operates in a different way from that in which it operates where the position is reversed and the wife is the wrongdoer: *Henderson v. Henderson*.¹⁴ The Queen's Proctor has contended for a negative answer to the question, but has not put the case in the same way. He admits that the doctrine of condonation does not apply except by analogy to what may be called a current period of desertion, as opposed to a period which of itself provides a complete cause of action. He contends that the act of voluntary sexual intercourse is, however, conclusive evidence of a termination of desertion, and that neither party can be heard to say after such an act that cohabitation has not been resumed. Accordingly, he says *Mummery v. Mummery*¹⁵ was wrongly decided, because once the sexual act is proved the

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¹⁰ [1951] P. 457.¹¹ [1951] P. 250.¹² [1944] A.C. 49.¹³ [1942] P. 107.¹⁴ [1944] A.C. 49.¹⁵ [1942] P. 107.

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factum of separation has gone. He contends that the act cannot be referable to anything else but living together as husband and wife.

In my judgment the argument, although it has considerable force, is not consistent with authority. It is now, I think, too late to say that acts of intercourse per se operate to terminate desertion.

Assistance is, I think, derived from *Rowell v. Rowell*,¹⁶ a decision of this court upon the construction of a deed of separation expressed to operate during the joint lives of the parties "if they should so long live separate from each other." The question there was whether the deed ceased to operate because the sexual act had taken place; in other words, must the parties be held to have ceased to live separate from each other because this event had occurred? The question was answered in the negative. In my opinion this involves a conclusion that the parties had not ceased to live apart, which is the same thing as had not "resumed cohabitation," to use the formal language employed by the legislature in the Summary Jurisdiction Acts. I conceive that the result of this case would have been the same whichever spouse was setting up the deed.

This case was followed by the President in *Mummery v. Mummery*,¹⁷ which was a desertion case. The last decision has been regularly followed and expressly affirmed by the Court of Appeal in *Bartram v. Bartram*.¹⁸ In the latter case, the particular point was not in question, but the significance of the acts of intercourse can hardly have been overlooked by the members of the court. In any event, I would respectfully accept the decision of Lord Merriman P. in *Mummery v. Mummery*,¹⁹ and the reasoning upon which it is based, with one qualification. In *Mummery's* case¹⁹ Lord Merriman P. expressly reserved the point now in question by using the words "as regards the wife "at any rate," thus showing plainly that he had in mind the impact of the doctrine of condonation on sexual intercourse by a husband with an erring wife.

This brings me to consider the question whether the court is bound to hold that the husband is precluded by his act of having had sexual relations with his wife from relying upon desertion preceding that act because he has thereby condoned her desertion. In the first place there is no authority binding on this

¹⁶ [1900] 1 Q.B. 9.

¹⁷ [1942] P. 107.

¹⁸ [1950] P. 1.

¹⁹ [1942] P. 107.

court to this effect. The actual decision of the Divisional Court in *Viney v. Viney*²⁰ is not open to criticism, since the offence there under consideration was adultery, so that condonation of adultery only was directly in question. The observations on the question now before the court were obiter dicta.

Cases under the old law, such as *Blandford v. Blandford*²¹ and *Paine v. Paine*,²² where condonation was applied to completed desertion giving rise in each case to a cause of action, are not directly in point. The same may be said of *Maslin v. Maslin*,²³ a recent decision of Havers J., where, intercourse having taken place after a petition based on desertion had been presented by the husband, the petition was dismissed.

The absence of any reference to condonation in the section of the Matrimonial Causes Act, 1950, dealing with divorce for desertion is of significance but not conclusive, particularly as sodomy, which is also omitted from the offences barred by condonation, is held to be in the same position as adultery: *Statham v. Statham*, per Greer L.J.²⁴

I think the key to the problem is to be found in an examination of what is meant by condonation in the legal sense. Since offences condoned are capable of revival, condonation is not equivalent to forgiveness in the theological sense. It may be said that it implies merely that the legal remedy for the time being is waived. See *Beeby v. Beeby*.²⁵ "Condonation is "forgiveness legally releasing the injury. . . . In general it is "a good plea in bar; it is not fit that a man should sue for a "debt which he has released." Nevertheless, there is always an element of true forgiveness: see *Henderson v. Henderson and Crellin*, per Lord Simon L.C.²⁶ This element involves, in my judgment, the factor of choice. The husband must be held to have made such a choice when he has sexual relations with his wife after his right of action against her has accrued. On the other hand, the choice, whether to forgive or not, is not open during a current period of desertion to the deserted spouse who is asked to receive back his erring partner. Whether he forgives her or not, he must take her back and thereafter her desertion is at an end. If he will not receive her, he becomes himself a deserter. He cannot say: "You have deserted me; I will not "forgive you for running away and therefore you cannot return."

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²⁰ [1951] P. 457.²¹ 8 P.D. 19.²² [1903] P. 263.²³ [1952] 1 All E.R. 477.²⁴ [1929] P. 131, 145.²⁵ (1799) 1 Hag.Ecc. 789, 793, 797.²⁶ [1944] A.C. 49, 52.

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During the whole of the current period he must affirm the marriage. In the case of a completed period of desertion (now only after the presentation of a petition) in the case of adultery and of cruelty he can disaffirm the marriage as soon as the offence is committed.

Accordingly, in my opinion, as I ventured to suggest in *Lane v. Lane*,²⁷ when considering a current period of desertion, the primary question is: Aye or No, "is it terminated?"—not "is it condoned?" It can be terminated by a resumption of cohabitation involving a mutual or, as it has been called, a bilateral act, or it can be terminated by the deserter returning, or even offering to return, provided the offer is not one which for some reason the offeree is entitled to refuse, but it is not necessarily terminated as a matter of law by the sexual act.

So to hold would, in my judgment, put difficulties in the way of attempted reconciliation, which would be regrettable, and, for that reason, I think it would be against the public interest if one were driven to such a conclusion. I am glad not to be so driven. At the same time, the facts in each case must be carefully considered, because if it be found that there has really been a mutual coming together for however short a time, it is clear that in such a case desertion has been terminated. The case under consideration is in itself, on its own facts, not free from difficulty, but I have come to the conclusion that upon the facts as found there was no mutuality, and the appeal should be allowed.

Appeal allowed.

Solicitors: *Kinch & Richardson, for Percy Hughes & Roberts, Birkenhead; Treasury Solicitor.*

B. A. B.

²⁷ Ante, 34.

NOTE.—The Superior Court of New Jersey held in *Sabia v. Sabia* (1951) 84 Atlantic Reporter 2nd Series 261, p. 265, that after a wife had deserted her husband an isolated act of sexual intercourse did not amount to condonation.

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Husband and Wife—Judicial separation—Jurisdiction—Quality and extent of residence required—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 32.

Singleton,
Birkett and
Hodson L.JJ.

The husband domiciled and resident in Jamaica married his wife in 1946 in England, then domiciled and resident in England. They settled in Jamaica where a child was born to them on December 16, 1947. The wife left her husband in Jamaica in July, 1949, and came to England bringing her child with her. On August 20, 1949, the husband came to England for two purposes: (1) for the purpose of the business of a textile firm, with connexions in Manchester and London of which he was the manager or representative, and (2) to secure the custody of his child.

On October 12, 1950, the husband took out a summons under the Guardianship of Infants Acts, 1886 to 1925, for the custody of the child, but these proceedings were stayed on the wife in England on October 31, 1950, presenting a petition for judicial separation on the ground of cruelty. The wife alleged (*inter alia*) that whilst her husband was in England between August 20 and October 12 she was put in fear by her husband's attitude and threats. The husband remained in England until December 20, 1950, engaged on his business and, at first in the proceedings for the custody of his child, living in hotels and boarding-houses. The husband contended that he was not resident in England and that the court had no jurisdiction to hear the petition. By consent this was tried as a preliminary issue.

Held, that the extent and quality of the residence by the husband and wife in England was sufficient to found jurisdiction.

Observations of Gorell Barnes J. in *Armytage v. Armytage* [1898] P. 178, applied.

APPEAL from Mr. Commissioner Rhodes.

The parties were married in April, 1946, the husband being then resident in and domiciled in Jamaica, where he was born. The wife up to that time was domiciled and resident in England, where the marriage took place. They settled in Jamaica after the marriage and a child was born on December 16, 1947. Some time in 1948, the wife visited England but returned to Jamaica in 1949. In July, 1949, she left her husband and returned to England. On August 20, 1950, the husband arrived in England. He was the representative or manager of a textile firm in Jamaica and he had connexions in Manchester and apparently in London. He came to this country partly on business and partly to obtain custody of his child. Whilst in England he lived in hotels and boarding-houses, moving from place to place in London and

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Manchester engaged in business and also in the proceedings for the custody of the child.

The husband took out a summons on October 12, 1950, under the Guardianship of Infants Acts, 1886 to 1925, for custody of the child. On October 31, 1950, the wife petitioned the court for judicial separation on the ground of cruelty, and that petition was served on the husband in England. Thereupon proceedings for the custody of the child were stayed owing to the wife's petition. In an affidavit the wife swore: "The defendant "remained in England from August 20, 1950, until December 20, "1950. After his return to England and before the issue of the "originating summons in the Chancery Division, I was again put "in fear by his attitude and by his threats and that was why I "consulted a solicitor. When I told him that I had consulted "a solicitor and told him the name of the solicitor he threatened "physical violence against my said solicitor."

By her petition the wife alleged that neither she nor her husband were domiciled in England, but that they were both resident in England. The husband, by his answer, denied the cruelty, and later amended his answer by stating that he was not, at the time of the commencement of the proceedings or at any other time, resident in England, and he contended that the quality of his stay in England during the relevant period was insufficient to give the court jurisdiction. By consent this issue was ordered to be first determined.

The commissioner decided against the husband's contention, and the husband appealed.

L. Lewis for the husband. On this issue the court will consider the practice and jurisdiction of the ecclesiastical courts: see section 32 of the Supreme Court of Judicature (Consolidation) Act, 1925. There must be an element of permanence in the residence of both parties—husband and wife—to found jurisdiction here in this suit by the wife for judicial separation. See the judgment of Dr. Lushington in *Collett v. Collett*¹ and the case there cited from Burn's Ecclesiastical Law. Here there was no such element of permanence on the part of the husband; he was in England on a short temporary business visit, during which he took proceedings to obtain the custody of his child. There must be something in the nature of general habitation on the part of both parties. In this case the general habitation of the husband was in Jamaica. What was decided in *Armytage v. Armytage*²

¹ (1843) 3 Curt. 726, 730.

² [1898] P. 178.

was that the residence of the parties will give jurisdiction; the amount and nature of the habitation which will amount to residence was not in issue. It is submitted that to give the court jurisdiction in such a case the parties must have a settled abode in England. The husband's presence on a temporary visit, either for business or pleasure, will not found the jurisdiction. In *Thornton v. Thornton*³ the court stated that they had jurisdiction and that must have been on the ground that the husband, an officer in the Indian Army, was domiciled in England. The only issue was whether the proceedings by the wife in this country should be stayed in view of the petition in Bombay. The residence must be bona fide and not casual or as a traveller: *Manning v. Manning*.⁴ See also *Yelverton v. Yelverton*.⁵ In *In re Adoption Application No. 52/1951*,⁶ on an application for adoption under the Adoption Act, 1950, the question for determination arose by reason of the terms of section 2 (5) of that Act: "An adoption order shall not be made "in England unless the applicant and the infant reside in "England." Harman J., in that case, held that where the applicant, a wife, had remained in England when her husband had gone back to Nigeria, where they had both resided, the wife was not resident in England: see, lastly, *Graham v. Graham*.⁷

J. di V. Nahum, for the wife, was not called on.

SINGLETON L.J. I will ask Hodson L.J. to give the first judgment.

HODSON L.J. The husband was in England between August 20, 1950, and December 20, 1950. He had no house in England, and, according to his evidence, he lived in hotels and boarding-houses, moving from one place to another in London and in Manchester in connexion, not only with business which he had with his customers and firms in England, but also in connexion with his application for the custody of the child. The point taken below, and in this court, is that the quality of the residence which the husband had during that period was insufficient to give jurisdiction. Section 32 of the Supreme Court of Judicature (Consolidation) Act, 1925, which governs the position, provides: "The jurisdiction vested in the High Court and the Court of

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³ (1886) 11 P.D. 176.

⁴ (1871) L.R. 2 P. & M. 223.

⁵ (1859) 1 Sw. & T. 574.

⁶ [1952] Ch. 16.

⁷ [1923] P. 31.

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 1952 “practice, be exercised in the manner provided by this Act or
 MATALON “by rules of court, and where no special provision is contained
 v. “in this Act or in rules of court with reference thereto, any such
 MATALON. “jurisdiction shall be exercised as nearly as may be in the same
 Hodson L.J “manner as that in which it might have been exercised by the
 “court to which it formerly appertained.”

That, it is conceded, throws the court back to the practice and jurisdiction of the ecclesiastical courts, and Mr. Lewis has contended that the length, character and quality of the residence here is insufficient, or would have been regarded as insufficient by the ecclesiastical courts, and that therefore this court ought not to entertain the petition. He pointed out that one looks on a question of jurisdiction to the statute of Henry VIII, the Statute of Citations, which was passed in affirmance of the common law, and he referred to a decision of Dr. Lushington in *Collett v. Collett*.⁸ That case undoubtedly goes a long way to support his argument that the ecclesiastical courts, in considering the jurisdiction of dioceses (not the jurisdiction of a realm), did look to see that there was at any rate an element of permanence in the residence before asserting jurisdiction. Dr. Lushington said⁹: “That statute”—the statute of Henry VIII—“is the document by which this court must be governed in these proceedings; it was passed for the purpose of preventing abuses which took place, by reason of the process to appear in the arches and other ecclesiastical courts being served on a party far from and out of the dioceses, where the party cited dwelt (these words are of some importance) not where the party might happen to be at the period of issuing the citation, but out of the diocese wherein he dwelt. No doubt the word dwell means a permanent dwelling: in no other part of the statute are there any words to give a different meaning to the words I have cited, and in the enactment the words are, ‘That no manner of person shall be cited, or called to appear out of the diocese, wherein he shall be inhabiting, at the time of the awarding or going forth of the citation.’ Undoubtedly, the word *inhabit* is here used in precisely the same sense as the word *dwelt*, in the prior part of the statute. The term *inhabit*, is one to which many meanings have been attached by the law, and is one which can only be construed by reference to the circumstances of each individual case.”

⁸ 3 Curt. 726.

⁹ Ibid. 729.

So, here, Dr. Lushington had not to construe the word "residence," but to construe the meaning of the words "dwell" and "inhabit," which have been translated "residence" in later cases, as is shown by the form of the pleading in those cases, and in that connexion I would refer to a judgment of James L.J. in *In re Bowie*,¹⁰ a bankruptcy case, which was cited by Harman J. in *In re Adoption Application No. 52/1951*,¹¹ which is to this effect: "There are cases in which it has been judicially decided, "and I think rightly, that the words 'residence' and 'business' "have no actual definite technical meaning, but that you must "construe them in every case in accordance with the object and "intent of the Act in which they occur."

Here one has to determine the extent of the residence which the courts require in considering the circumstances in which the courts are asserting jurisdiction. In this case a wife is complaining of cruelty, and is maintaining on oath that, during the period of her husband's sojourn in this country she was fearful of him by reason of threats which had been made. A very similar set of facts was considered in *Armytage v. Armytage*.¹² The relevant statutory provision then in force was the Matrimonial Causes Act, 1857, s. 22, which corresponds in effect to section 32 of the Act now in force.

I pass over some of the earlier cases to which Mr. Lewis drew our attention because I think that they really add nothing to the proposition which he originally enunciated, basing himself on the language of Dr. Lushington in *Collett v. Collett*.¹³ I think that that puts his argument as high as he wishes to put it. But the matter was considered by Gorell Barnes J. in *Armytage v. Armytage*,¹⁴ which has always been regarded as an authoritative decision on the matters there decided, and Mr. Lewis has faced the difficulties presented by that case by saying that what really was decided in that case was not what is sufficient residence to give jurisdiction, but whether residence in a case of this kind gave jurisdiction at all, and I think that is true so far as the decision itself is concerned. Nevertheless, curiously enough, the facts in that case, which also was a case where cruelty was alleged, were very similar to the facts in this case. They were stated by Gorell Barnes J. as follows¹⁵: "At the end of June, "1897, the respondent came to, and has since resided in, "England, but I understand he has not taken up a permanent

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¹⁰ (1880) 16 Ch.D. 484, 486.¹¹ [1952] Ch. 16.¹² [1898] P. 178.¹³ 3 Curt. 726.¹⁴ [1898] P. 178.¹⁵ *Ibid.* 184.

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"residence here, and has only come to and is remaining in England for the purpose of enforcing, and so long as may be necessary to determine, such rights as he may have against the petitioner with regard to the children." On the facts it was (if I may so put it) a weaker case, because here the husband had the initial incentive of coming to this country on business. It is to be noted that the point was not taken by counsel who appeared for the husband in *Armytage v. Armytage*¹⁶ that the quality of the residence was insufficient to found jurisdiction. Nevertheless, the matter was very fully discussed by Gorell Barnes J., and he put the question in this way¹⁷: "The petitioner maintains that the test of domicile is not applicable as in a suit for dissolution of marriage, and that the ecclesiastical courts would have given her relief where she and her husband are both residing in England in the circumstances proved, whereas the respondent maintains that no relief would have been given because the parties are not domiciled in England, and no act of cruelty has been proved within the jurisdiction."

Mr. Lewis pointed out that residence in the jurisdiction was postulated; but in discussing the matter Gorell Barnes J. cited a passage from the speech of Lord Watson in *Le Mesurier v. Le Mesurier*,¹⁸ where he said: "If, for instance, a husband deserts his wife, although their residence be of a temporary character, these courts may compel him to aliment her; and, in cases where the residence is of a more permanent character, and the husband treats his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists and the general practice is to the effect that the courts of the residence are warranted in giving the remedy of judicial separation, without reference to the domicile of the parties." And then later Gorell Barnes J. said¹⁹: "I conclude from the writers to whom I have referred that most of them are disposed to consider that the courts of the country in which the parties are living, though not domiciled, ought to have the right in a matrimonial suit to afford protection to an injured party from the cruelty of the other party." Then the judge continued: "Lord Hannen may possibly have had such a case in his mind when, in giving judgment in *Firebrace v. Firebrace*,²⁰ he said: 'The domicile

¹⁶ [1898] P. 178.¹⁷ *Ibid.* 186.¹⁸ [1895] A.C. 517, 526.¹⁹ [1898] P. 178, 192.²⁰ (1878) 4 P.D. 63.

“ of the wife is that of the husband, and her remedy for matrimonial wrongs must be usually sought in the place of that domicile ’; but added ‘ It is not, however, inconsistent with this principle that a wife should be allowed in some cases to obtain relief against her husband in the tribunal of the country in which she is resident, though not domiciled.’ That was a suit for restitution of conjugal rights where the respondent, the husband, who was domiciled in Australia, had left England before the institution of the suit, and it was held that the court had not jurisdiction over him after he left this country, and that the suit could not be maintained. Had he remained in England it would seem from the cases of *Newton v. Newton* ²¹ and *Thornton v. Thornton* ²² that the suit could have been maintained.”

There is a passage in the judgment of Gorell Barnes J. to which Mr. Lewis referred, where, after referring to some of the old learning of the ecclesiastical courts, the judge said ²³: “ These are stated in general terms so far as concerns the matter under consideration by James L.J. in his judgment above referred to (see *Niboyet v. Niboyet* ²⁴), where the jurisdiction of the Court Christian is considered, and it is pointed out that the church and its jurisdiction had nothing to do with the original nationality or acquired domicile of the parties, that residence as distinct from casual presence on a visit or in itinere was an important element, but that residence had no connexion with or little analogy to the question of a person’s domicile.”

The judge was therefore alive to the necessity for something more than a casual presence or a visit when towards the end of the judgment he said ²⁵: “ No valid reason can be urged against the courts of a country, in which a husband and wife are actually living, pronouncing a decree which will protect the one against the other so long as they remain within the jurisdiction.”

Then Gorell Barnes J. referred to the facts of the particular case, which are closely parallel to the facts of this case ²⁶: “ He has come here ”—that is, the husband—“ and subjected himself to the jurisdiction of the courts of this country. Could anything be more unreasonable than for this court to hold that it has no power to suspend the wife’s obligation to live with

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²¹ (1885) 11 P.D. 11.²⁴ 4 P.D. 1, 4.²² (1886) 11 P.D. 176.²⁵ [1898] P. 178, 196.²³ [1898] P. 193.²⁶ Ibid. 197.

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 1952 "the courts in Australia to protect herself against her husband

 MATALON "in England? It may, I think, be safely laid down that the
 v. "ecclesiastical courts would formerly, and this court will now,
 MATALON. "interfere to protect a wife against the cruelty of her husband,

 Hodson L.J. "both being within the jurisdiction, when the necessities of the
 "case require such intervention. I therefore hold that this court
 "has jurisdiction to entertain this suit, and I pronounce a decree
 "of judicial separation in favour of the petitioner."

In my judgment, in this case the commissioner was right in taking the view that, although the point was not directly decided in *Armytage v. Armytage*,²⁷ yet the careful judgment of Gorell Barnes J. laid down sufficient guidance for him to ascertain the extent and the quality of the residence which was necessary to found jurisdiction in this case, and following that guidance he thought, and I think rightly thought, that the facts of the case before him warranted an assumption of jurisdiction, and, therefore, I think that he rightly decided the issue in favour of the wife.

In deference to Mr. Lewis' argument I will refer to the recent decision of Harman J. in *In re Adoption Application No. 52/1951*,²⁸ which was on an application by a wife and mother for adoption under the Adoption Act, 1950, the question to be determined arising on the construction, first of all, of section 2 (5) of the Act of 1950, which provides: "An adoption order shall not be made in England unless the applicant and the infant reside in England."

I need say no more than I have already impliedly said by my citation from the passage in the judgment of James L.J. in *In re Bowie*.²⁹ These questions of construction have to be decided against the background of the subject-matter, and although Harman J. in that case felt that a woman, who had remained in England while her husband had gone back to Nigeria, where he and she were resident, for the purpose of making an application for adoption of the child, did not qualify within the meaning of the Act because the word "resident" there denoted some degree of permanence, I think that that case really gives very little assistance, and it is not necessary for this court to express any opinion, one way or the other, whether on the construction of the word "resident" in that Act that

²⁷ [1898] P. 178.

²⁹ 16 Ch.D. 484.

²⁸ [1952] Ch. 16.

decision was right; indeed, I am not for one moment to be taken as throwing any doubt on the correctness of that decision.

In my judgment, this appeal fails.

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SINGLETON and BIRKETT L.JJ. concurred.

Appeal dismissed.

Solicitors: *Fletcher Napper & Co.; Hamwee (A. L.) & Co., Manchester.*

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Costs—Probate—Taxation and payment of certain costs—Subsequent bill of costs of administration—Order to pay refused.

A litigant in possession of a judgment against an opposite party to pay his taxed costs must lodge a bill for taxation which includes all the costs to payment of which, when taxed, the judgment entitles him. He is not entitled to select a portion of the costs, submit that portion for taxation as his costs of the action recoverable under the judgment, and, after obtaining an allocatur, make a selection of a further part of his costs and successfully apply for taxation of a bill for those further items as between party and party. Nor is he, having obtained taxation, entitled to an order to pay the amount of the allocatur.

The plaintiffs in a probate action were granted the costs of that action and lodged a bill of the plaintiffs' costs. An order to pay those costs was made and after various proceedings payment was obtained. That bill did not, however, include certain costs of administration pendente lite, in respect of which subsequent bills were lodged. The registrar taxed those bills and signed the allocaturs, and he also vouched the administrators' accounts; but he refused to make orders to pay these further costs. On appeal:—

Held, that the plaintiffs were not entitled to a further order. There was no reason why those costs and fees could not have been included in a bill carried in for taxation at the time when the taxation of costs was first taken in hand. The plaintiffs had, moreover, acted in such a way that the defendant must have been satisfied that when he had paid the amount of the original bill his liability for costs under the judgment had been satisfied.

The appeal was rightly brought by way of summons to the judge in chambers, and not by motion in court.

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SUMMONS (adjourned into court for judgment).

The following statement of facts is taken from the judgment: On November 23 and 24, 1948, Hodson J. tried an action entitled *In the Estate of Lewis Segalov, Decd.*, in which Morris Hyman and Solomon Teff were plaintiffs and Pinkus Segalov was the defendant. The action concerned the testamentary dispositions of the deceased (Lewis Segalov), in which the plaintiffs propounded a will dated April 12, 1946, and the defendant delivered a defence and counterclaim in which he pleaded that the will propounded by the plaintiffs ought to be pronounced against on the alleged ground that the deceased was not of sound mind, memory and understanding at the date of the said will. By way of counterclaim the defendant propounded an earlier will dated February 5, 1935, of which will he invited the court to decree probate.

On November 24, 1948, Hodson J. pronounced for the will dated April 12, 1946, propounded by the plaintiffs, and condemned the defendant in the costs incurred or to be incurred in the action on behalf of the plaintiffs. The writ in the action had been issued on June 11, 1947, and Barclays Bank Ltd. were appointed administrators pendente lite; up to the date of the judgment on November 24, 1948, the bank carried out their duties as such administrators. They then had no further duties save to pass their accounts, which would include and provide for their remuneration.

On January 2, 1949, the plaintiffs' solicitors lodged for taxation a bill of costs headed "Bill of costs of the plaintiffs to be taxed pursuant to the judgment of Hodson J. dated November 24, 1948," and endorsed on the outside "Plaintiffs' costs." That bill of costs was duly taxed by Mr. Registrar Pereira, who signed the allocatur on November 21, 1949, allowing the costs in the bill at £433 16s. 0d.

On the same day the plaintiffs' solicitors applied to the same registrar for, and obtained, an order dated November 21, 1949, ordering the defendant, within seven days from service, to "pay . . . the plaintiffs the sum of £433 16s. 0d., being the amount of the plaintiffs' taxed costs as certified by the said registrar of this Division." After various proceedings based upon that order, the plaintiffs obtained payment of the sum of £433 16s. 0d. on June 19, 1950.

On June 16, 1950, the plaintiffs' solicitors lodged for taxation two other bills of costs. One of them bore the heading "Bill of

"costs incurred by Barclays Bank Ltd., acting as administrators pendente lite of the estate of the above named deceased"; it was similarly endorsed. The other bill so lodged was headed "Costs, charges and expenses incurred on behalf of Barclays Bank Ltd. as administrators pendente lite in connexion with the Palestine estate of Louis (sic) Segalov, deceased." The endorsement on this bill was "Costs relating to the Palestine estate." Mr. Registrar Compton Miller taxed each of these two bills of costs and allowed the first at the sum of £253 9s. 6d. He signed the allocatur on September 25, 1950. He allowed the second of these bills at the sum of £66 10s. 4d., and signed the allocatur for that sum on the same date.

On April 19, 1950, the plaintiffs' solicitors lodged for examination and certificate the accounts of the administrators pendente lite, and filed the usual affidavit verifying those accounts. Mr. Registrar Compton Miller duly examined and checked the accounts, and certified that he had vouched them. The only two figures in those accounts which are relevant to the matters raised by the summons were the two items: £210, which the registrar allowed as the remuneration of the bank as administrators, and the fee paid by them on passing the accounts, namely £5 16s. 6d. The date of the registrar's certificate of accounts was November 21, 1950.

The matter came before the court by way of appeal from the refusal of Mr. Registrar Compton Miller to make an order upon the defendant to pay the amount of the two bills which he had taxed, and also the remuneration, etc., of Barclays Bank Ltd. as administrators pendente lite. According to the plaintiffs' case the defendant, by reason of the judgment as to costs delivered by the judge at the trial of the action, became indebted to the plaintiffs for the following sums which had since then been ascertained by taxation and certification respectively: Bill of costs taxed and ordered to be paid on November 21, 1949, £433 16s. 0d.; Bill of costs taxed and allowed at £253 9s. 6d.; Bill of costs taxed and allowed at £66 10s. 4d.; Administrators' remuneration allowed at £210 0s. 0d.; Fee on passing accounts, £5 16s. 6d.; making a total of £969 12s. 4d. Of this sum, the first item, £433 16s. 0d., was paid on June 19, 1950, leaving a sum of £535 16s. 4d., for which no order to pay had been made or applied for.

On March 20, 1952, the plaintiffs applied to Mr. Registrar Compton Miller for an order on the defendant to pay the above-

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mentioned sum of £535 16s. 4d. The registrar having refused to make the order, the matter came before the court (by way of appeal from his refusal) upon a summons asking (1) for an order for payment of that sum; (2) if necessary, an amendment under the slip rule (R.S.C., Ord. 28, r. 11) converting the order of November 21, 1949, into an interim order from a final order to pay the amount of the bill of costs for £433 16s. 0d.; (3) in the alternative for a direction that the order of November 21, 1949 (which was for payment of £433 16s. 0d.), be taken off the file and an order substituted therefor ordering the defendant to pay £969 12s. 4d., and to have credit for the sum of £433 16s. 0d. which he had paid on June 19, 1950; (4) such other directions as the justice of the case might require; and (5) an order upon the defendant to pay the costs of the application to the registrar and of the appeal.

Geoffrey Crispin for the plaintiffs.

Charles Lawson for the defendant.

Argument was in chambers. The nature of the submissions made appears in the judgment.

Cur. adv. vult.

WALLINGTON J., reading his judgment, stated the facts and continued:—A point of practice was raised before me on behalf of the defendant, namely, that the appeal to me ought to have been by motion in court and not by summons in chambers. In my opinion this is not a sound submission. The whole of the matter before the registrar and before me is concerned with an order made in chambers, and in my opinion it has no direct relation to the order for payment of costs made by the judge who tried the action. It is true that the judge's judgment making the defendant liable to pay the plaintiffs' taxed costs and the taxation of the costs at £433 16s. 0d. gave the plaintiffs the right to have the order to pay, but that order was a chambers order, not an order made in open court or arising out of any matter which had taken place in open court. This point is of no practical importance in relation to the appeal to me, and I do not pursue the point further as I think that the appeal is properly before me on the summons on which it is based.

In the course of their able arguments before me counsel referred to a number of authorities, and I shortly refer to them. Mr. Crispin, for the plaintiffs, cited *Silkstone and Haigh Moor*

*Colliery Co. v. Edey*¹ (relating to a trial before Byrne J. and an appeal from him to the Court of Appeal), in support of the proposition that in a proper case a taxing master's certificate may under the slip rule be taken off the file of the court and that the amounts thereby certified may then be included in the taxing master's final certificate of taxation. This is a proposition with which, if I may say so, I do not disagree.

Mr. Lawson relied on *Davis v. Earl of Dysart*² for the proposition that a party and party bill of costs may be added to or varied after it has been brought into the office at any time before the taxation is concluded, a proposition with which I entirely agree. Mr. Crispin relied very strongly on *Chessum & Sons v. Gordon*,³ in which items which had been omitted from a bill of costs carried in for taxation and taxed were allowed to be inserted under the slip rule (R.S.C., Ord. 28, r. 11). I do not feel any difficulty about such a proposition in any case in which the facts show (as the facts in that case clearly established) that the omitted portions (which were allowed to be inserted after taxation of the costs) have been omitted owing entirely to an accidental slip or omission.

Mr. Crispin, for the plaintiffs, referred to *Fisher and Joy v. Fisher and Others*⁴ as an authority for the proposition, which I, of course, accept, that the condemnation in costs of a party to a probate suit includes all the charges of an administrator pendente lite. The point with which Ormerod J. dealt in *In re Howlett, Decd.*,⁵ did not arise in the present case. If it had arisen I would have expressed my complete concurrence in the judgment of Ormerod J. in *In re Howlett, Decd.*,⁵ with which, if I may respectfully say so, I entirely agree.

I am of opinion that the plaintiffs are not entitled to any one of the orders for which they ask. It is clear, in my view, that the order of the trial judge was one which would probably have entitled the plaintiffs to recover against the defendant, by means of an order to pay, not only the sum of £433 16s. 0d. which they have in fact recovered, but also a further sum of £469 6s. 0d. made up of the administrators' costs and remuneration, £210, together with the fee on passing their accounts of £5 16s. 6d., and the amount of the costs taxed at £253 9s. 6d. There was no reason why these costs and fees could not have been, and in my opinion they all ought to have been, included in a bill carried

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¹ [1901] 2 Ch. 652.⁴ (1879) 4 P.D. 231; 48 L.J.P. 69.² (1855) 21 Beav. 124.⁵ [1950] P. 177.³ [1901] 1 Q.B. 694.

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in for taxation at the time when the taxation of costs was first taken in hand. So soon as the judgment in the action was pronounced the duties of the administrators pendente lite ceased and the conduct of the affairs of the estate automatically came into the hands of the executors of the will pronounced for, namely, the plaintiffs in the action; there would have been no difficulty, in my opinion, in dealing with those matters at one and the same time so that the defendant would have known in or about the months of November or December, 1949, what was his liability for the costs which the trial judge had ordered him to pay.

The foundation of the various alternative applications made on behalf of the plaintiffs appears to me to depend upon whether, when they delivered and taxed the bill for the £433 16s. 0d., they omitted the other charges of which they now seek an order for payment, because, in so omitting them, they acted under an accidental slip or omission. In my opinion they quite clearly did not so act, and there was not in fact an accidental slip or omission.

The affidavit made by Mr. Solomon Teff, a solicitor, and one of the plaintiffs, an affidavit which he swore on April 15, 1952, sets out in paragraph 4 the fundamental reason why his firm deliberately excluded the costs which they now seek to recover. This paragraph is in the following terms: "After judgment, my firm brought in a bill of costs which excluded the costs referred to in paragraph 3 hereof, because there is always considerable delay in obtaining the accounts from bank administrators as such accounts had to be audited first. The plaintiffs did not think it wise to wait until such costs were ascertainable before bringing in a bill since they considered it their duty as executors to take immediate steps to recover the costs then ascertainable. Indeed, the plaintiffs appear to have been justified in that the defendant paid only after a bankruptcy petition had been presented against him by the plaintiffs." The rest of this affidavit is useful in elucidating the remaining facts, and I will read it: "These costs (excluding those referred to in paragraph 3 hereof) were duly taxed and an order to pay was made against the defendant on November 21, 1949"—which is a year after the judgment pronounced by the trial judge—"and paid by him on June 19, 1950."

Paragraph 6 of the affidavit reads: "The accounts were subsequently received from the said bank and were taxed

“ against the defendant, who was given notice of such taxation
 “ and who attended by his solicitors’ clerk. Allocaturs were
 “ made in respect of such additional costs on September 25, 1950,
 “ which amount in all, as will be seen from the correspondence
 “ hereinafter referred to, to £535 16s. 4d., certain items having
 “ been taxed off as against the defendant, although, of course,
 “ recoverable out of the estate.” By paragraph 7: “ The
 “ registrar, upon application made to him, has declined to make
 “ a further order to pay against the defendant, and has said that
 “ while he has every sympathy with the plaintiffs and agrees
 “ that the additional costs are chargeable against the defendant,
 “ he has no power to make any further order to pay. He says
 “ that the plaintiffs should have waited for their complete bill
 “ before taxing.” Certain correspondence is then exhibited
 which I do not think assists in the matter with which I am
 dealing.

Mr. Teff indicates in his affidavit that on the taxation of the
 second and third bills of costs to which I have referred, the
 defendant was represented by his solicitor’s clerk. There is not
 before me any information as to the part in fact taken in detail
 by the defendant’s solicitors’ clerk on the taxation of these
 additional bills of costs, but, in my opinion, his presence there
 is immaterial.

A matter which is not without importance is the fact that in
 submitting to taxation and obtaining payment of the bill of costs
 allowed at £433 16s. Od. the plaintiffs’ solicitor acted in such a
 way as to make it clear to the defendant that that bill was the
 bill of costs which was taxable pursuant to the judgment of the
 trial judge in which he condemned the defendant in the plain-
 tiffs’ costs of the suit. It is impossible for me to entertain any
 doubt that, on receipt of that bill and of the order to pay and
 of the pressure for payment, the defendant must have been
 satisfied that having paid the amount of that bill his liability
 for costs under the judgment had been satisfied. Why his
 solicitors’ clerk attended the subsequent taxation I do not know,
 and it does not seem to me to be of any importance.

I now deal with the application in the various forms in which
 it is made to me: (1) I have, I hope, sufficiently indicated the
 reasons why, in my opinion, no order can now be made in respect
 of the sum of £535 16s. 4d. (2) In my opinion there is no basis
 on which it would be possible properly to convert the order of
 November 21, 1949, from what it appears to be, and in fact and

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in law is upon its face, namely, a final order to pay the sum of £433 16s. 0d. into an interim order. In my opinion it would be wrong to deal with the order of November 21, 1949, in any manner so as to clear the way for the making of an order which would indicate that anything more than £433 16s. 0d. was then due or could thereafter become due from the defendant for the plaintiffs' costs of action.

(3) As to the suggested substitution of another order for the order of November 21, 1949, relating to the bill for £433 16s. 0d., I hold the view that an order for payment of the full sum of £969 12s. 4d. in place of the order on the record of November 21, 1949, would be improper on a variety of grounds. Any such substituted order would require that the facts be set out in it, and those facts could not, in my view, justify the making of any such substituted order. I am clearly of opinion that the plaintiffs having submitted and obtained taxation—and incidentally payment—of their costs of action, were not entitled to tax, as between party and party, any further bill. It appears to me to be quite clear that a litigant in possession of a judgment against an opposite party to pay his taxed costs must lodge a bill for taxation which includes *all* the costs to payment of which, when taxed, the judgment entitles him. He is not, in my opinion, entitled to select a portion of the costs, submit that portion for taxation as his costs of the action recoverable under the judgment, and, after obtaining an allocatur, make a selection of a further part of his costs and successfully apply for taxation of a bill for those further items as between party and party. Nor is he, having obtained taxation, entitled to an order to pay the amount of the allocatur.

In this case it is true that the successive bills after the first were taxed by Mr. Registrar Compton Miller, and that he signed allocaturs for the amounts, namely, £253 9s. 6d. and £66 10s. 4d. Mr. Registrar Pereira had taxed the bill of costs for £433 16s. 0d. about ten months or a year earlier. I do not know what, if anything, Mr. Registrar Compton Miller knew about that earlier taxation at the time when he received and taxed the two later bills of costs. If they appeared to him to be lodged as solicitor and client bills—as, having regard to their titles, he might well have thought that they were—their taxation might have been useful. The same observation applies, in my view, to his allowance of the 200 guineas fee for the administrators' remuneration.

When I say that that taxation might have been useful I

mean this: that no doubt the plaintiffs will have to pay their own solicitors the amount of their bills when taxed, and the bills, having now been taxed, as I have said, by Mr. Registrar Compton Miller, there will be no doubt between the plaintiffs and their solicitors about the amount for which the plaintiffs become liable to their solicitors. However this may be, it is quite clear, in my opinion, that the fact that those costs were taxed and the remuneration fixed and allowed cannot entitle the plaintiffs to an order upon the defendant to pay them. It may well be that the plaintiffs' solicitors acted wisely in the course which they took in postponing two parts of their party and party bill of costs and charges as they did. Of this I know nothing, except that Mr. Teff, in his affidavit, expresses clearly his opinion that they did. But in my clear view, for reasons which I hope that I have sufficiently expressed, it is impossible for me to hold (1) that anyone concerned in these matters has acted under an accidental slip or omission, or (2) that the plaintiffs are entitled to the order for which they now apply.

Mr. Crispin, on behalf of the plaintiffs, appealed to me to reverse the order of the registrar and make the order for which they applied, on the ground that in justice they are entitled to it, and that if the order were refused (as the registrar had refused it) justice would fail. In my opinion, for the reasons already expressed, justice would be defeated if the order were made. This appeal must be dismissed with costs here and on the application to the registrar. I will mark it "Fit for counsel here and "below."

Appeal dismissed.

Solicitors: *Teff & Teff; Thornton, Lynne & Lawson.*

J. B. G.

BANKS v. BANKS.

Husband and Wife—Divorce—Petition—Allegation of adultery with unknown man at unknown time and place—Particulars—Nature of petitioner's case—Explanatory affidavit.

A petitioner for divorce alleged that his wife had in or about April, 1946, committed adultery at a place unknown with a man whose name and identity were also unknown. In answer to a request on behalf of the wife to be informed of the nature of the

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petitioner's case, he replied: "The nature of the petitioner's case is that he is not the father of the child born to the respondent on January 15, 1947." An order by the registrar for further and better particulars to be furnished in an explanatory affidavit was set aside by Wallington J. On appeal by the wife:—

Held, that the wife was entitled to such particulars as would reasonably enable her to meet the case made against her; that the assertion that the husband was not the father of the child could only be established from other facts, and those facts, as opposed to the evidence in support of them, should be set out either in the pleading or in particulars given following the pleading.

Decision of Wallington J. reversed.

APPEAL from Wallington J.

The husband, by his petition, alleged adultery by the wife "in or about April, 1946, at a place unknown to the petitioner "with a man whose name and identity are unknown to the "petitioner." Leave had been given to dispense with a co-respondent.

The following further and better particulars were by letter asked for on behalf of the respondent wife:—"Specify the date "upon which and the place at which adultery is alleged to have "been committed. If these particulars cannot be furnished, give "the nature of the petitioner's case." The reply of the petitioner was: "The petitioner is unable to furnish the particulars "requested. The nature of the petitioner's case is that he is not "the father of the child born to the respondent on the 15th day "of January, 1947."

Mr. Registrar Pereira ordered the petitioner to file an explanatory affidavit, but this order was set aside by Wallington J., who held that the particulars given were sufficient.

The wife appealed.

Donaldson Loudoun for the wife.

Armstead Fairweather for the husband.

BIRKETT L.J. I will ask Hodson L.J. to deliver the first judgment.

HODSON L.J. [having stated the facts, continued]: The controversy in this court centred upon the question whether the reply of the husband to the request for particulars is a sufficient indication of the case which the wife has to meet, it being settled in all divisions of the court that a litigant is entitled to such particulars as will reasonably enable him or her to meet the case

made on the other side. The argument for the husband has been that he has said enough. Of course, the allegation that his wife has given birth to a child discloses of itself no case, but it is contended that the further averment that he is not the father of the child is a sufficient averment to enable the wife to meet the case made against her. I think that that is wrong. The assertion that the husband is not the father of the child is an assertion which can be established, I think, only by inference from other facts. If that is the true view, it is right that the other facts, as opposed to the evidence in support of those facts, should be set out in the pleading, or in particulars given following upon the original pleading.

During the course of the argument it was suggested that there might be various facts and circumstances from which the inference could be drawn that this man was not the father of this child, either that he was abroad or that he was not having sexual intercourse with his wife, although living with her, or that he was taking steps to prevent conception or that the child was of a different blood group. Whatever the circumstances may be from which the inference is to be drawn, I think that the wife is entitled to have the nature of the case made clear, either by particulars of dates and places of adultery, or by the explanatory affidavit which has been ordered. I see no reason to interfere with the form of the order. I understand that the husband, through his counsel, takes no particular point as to whether the nature of the case should be included in the explanatory affidavit, or should be part of the particulars. In substance, therefore, the order of the registrar was right and this appeal should be allowed.

BIRKETT L.J. I agree. The order will be, appeal allowed and the order of Mr. Registrar Pereira of April 7, 1952, restored.

Appeal allowed.

Solicitors: *Waterhouse & Co., for F. B. Jevons & Riley, Tonbridge; C. R. Enever, Freeman & Co.*

A. W. G.

C. A.

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May 5.

LOWRY v. LOWRY.

Lord Merri-
man P. and
Pearce J.

Husband and wife—Justices—Jurisdiction—“Last ordinarily resided together as husband and wife in England”—Maintenance Orders Act, 1950 (14 Geo. 6, c. 37), s. 1 (1).

After a separation of some years a husband and a wife were reconciled and spent two nights together at a former matrimonial home in London. It was understood by the wife that they would later settle down together somewhere in England when the husband obtained employment. There was, however, no subsequent resumption of cohabitation, and the husband was resident in Northern Ireland when the wife issued a summons on the ground of desertion in a court of summary jurisdiction in London. It was submitted that the court had jurisdiction by reason of the provisions of section 1 (1) of the Maintenance Orders Act, 1950. The magistrate found that there was jurisdiction and that desertion was proved, and made an order for maintenance.

Held, that when the parties were reconciled there was a bilateral intention of setting up a matrimonial home together, which did not merely consist in staying for a night as a lodger in a particular set of rooms, but which had an element of permanence about it; and that the parties therefore “last ordinarily resided together as man and wife in England” within the meaning of the subsection. A night spent at an address by a solitary traveller does not carry so much weight or consequence as that spent by a husband who returns to and is reconciled with a wife in a home where they have lived together in earlier days before their estrangement; for the husband in such a case has returned not only to an address but to a “state of things.”

Observations in *Mummery v. Mummery* [1942] P. 107, 109, as to the meaning of a resumption of cohabitation applied.

APPEAL from the metropolitan magistrate (Miss Sybil Campbell) sitting at Tower Bridge magistrates’ court.

The following statement of facts is taken from the reasons given by the magistrate for her decision on February 12, 1952, whereby the husband was adjudged to have last ordinarily resided together with the wife as husband and wife in England, within the meaning of section 1 (1) of the Maintenance Orders Act, 1950, and to have deserted his wife. The husband was ordered to pay maintenance of 30s. a week for the wife and of 15s. each in respect of the children of the marriage, the custody of whom was given to the wife:—

“The defendant left Southern Ireland where he was born and came to England in 1935, when he joined the Royal Air Force. The parties were married in England in August, 1938, and until

" 1941 lived with the wife's parents in London. The defendant, who was still in the Royal Air Force, visited the wife at week-ends and when he was on leave.

" In 1941 the wife went to live for a time in Newbury, Berks, with the defendant's sister-in-law, and then went to Dundalk in Eire. The defendant was transferred in the course of his duties in the Royal Air Force to Antrim, and visited his wife when on leave at Dundalk. They drifted apart.

" The defendant states that in 1942 he had seven days' leave and took his wife back to London to her mother, and says: " After that I gave up her company; her mother had too much influence on her."

" In September, 1947, the defendant returned to London after being in America, and I am satisfied that during the two nights he spent with her in London in that year they were reconciled, and that the wife was willing to go to him when he found a home for her. He never found such a home nor offered it to her.

" He now states that he is not willing to have his wife to live with him again. On these facts, the interpretation of which I did not find easy, I came to the conclusion that the parties last ordinarily resided together in London in 1947, that desertion then took place and has continued ever since."

In September, 1947, the spouses resided for the two nights at the residence of the wife's mother, which was their first matrimonial home.

The husband, who attended the hearing, gave an address in Belfast; the wife was resident in London. The husband submitted inter alia on his notice of appeal that the magistrate was wrong in law in holding that the court had jurisdiction under section 1 (1) of the Maintenance Orders Act, 1950,¹ and that she was wrong in law in holding that the parties "last ordinarily resided together" in England within the meaning of that subsection.

Leonard Halpern for the husband. It was never the husband's intention to set up a permanent residence in London with any degree of continuity, and two days was quite insufficient to

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¹ Maintenance Orders Act, 1950, s. 1 (1): "... a court in England shall have jurisdiction in proceedings under section four of the Summary Jurisdiction (Married Women) Act, 1895, against a

" man residing in Scotland or Northern Ireland, if the applicant in the proceedings resides in England and the parties last ordinarily resided together as man and wife in England. . . ."

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establish sufficient permanence of residence to comply with the requirements of the statute. [He referred to *Levene v. Commissioners of Inland Revenue*²; *Hopkins v. Hopkins*³; *In re an Adoption Application*⁴ and *Macrae v. Macrae*⁵ upon the meaning of "ordinary residence."]

[LORD MERRIMAN P. What difference is there in law between resuming cohabitation at a place and ordinary residence together at that place?]

The crux is the degree of permanence.

[PEARCE J. Far more occurs when a husband returns to and is reconciled with a wife than in other cases. Is not that home their "ordinary residence"?)

W. G. Wingate for the wife. The house in London was the ordinary home of the parties and the only place where it could be said that there was an ordinary residence.

LORD MERRIMAN P. referred to the finding of the magistrate and said:—This decision is challenged on the grounds that the magistrate had no jurisdiction to deal with this case at all; that if she had jurisdiction the facts did not warrant a finding of desertion, and that if an order was justified the amount was excessive. [His Lordship disposed of the question of amount, which he refused to vary, and continued:] The really serious point about this case is the question of jurisdiction. As will be seen, that is also to some extent bound up on the facts with the issue of desertion. The question arises in this way:—Under the Maintenance Orders Act, 1950, s. 1, an English court of summary jurisdiction has jurisdiction, which it certainly did not possess before, having regard to certain very clear decisions to that effect, to make against a man living in Scotland or Northern Ireland orders for maintenance on behalf of a wife in certain circumstances. That this man resides in Northern Ireland cannot be doubted, and he gave an address in Belfast. It is also necessary for the wife to show that she resides in England. In this case the wife resides with her mother at an address in London where the mother carries on her business. But that is not enough, because the wife must also show that the parties last ordinarily resided together as man and wife in England, and those are the words which are crucial in this case.

The magistrate has found that that was so, and that they last ordinarily resided together as man and wife in England, on

² [1928] A.C. 217.

³ [1951] P. 116, 120.

⁴ [1952] 1 Ch. 16.

⁵ [1949] P. 397.

an occasion in 1947, when, by no means for the first time, they resided together with the wife's mother. Moreover, the magistrate has held that it was from that matrimonial home that the husband deserted the wife. Counsel for the husband has refrained from arguing the point, though it was raised by the notice of appeal and was indicated as one of the points in the case; but if it is a fact that these parties last ordinarily resided together as man and wife at the mother's address in England, on the evidence about the parting on that occasion, in my view there can really be no argument that the parting had the quality of desertion on the part of the husband, as the magistrate has found: therefore I do not need to say any more about that part of the appeal.

I will confine myself now to the important question whether it can truly be held that these parties were last ordinarily resident together as man and wife in England, and not elsewhere. The words "ordinarily reside" or "ordinarily resident" have a familiar ring. They have been interpreted in connexion with income tax, and the best known case on the subject is *Levene v. Commissioners of Inland Revenue*.⁶ That case establishes that as a matter of law it is extremely difficult, if, indeed, it is possible, to distinguish between "residence" and "ordinary residence." It also establishes the principle, which is important in the present case, that when the commissioners, to whom the duty is entrusted, do find one way or the other as to residence that is a finding of fact which is not to be disturbed if there is evidence to support it. That principle applies mutatis mutandis to this appeal, because unless it can be fairly said that the magistrate's decision that these parties last resided together as man and wife in England has no evidence to support it, our business is to uphold it.

This particular phrase does differ from the corresponding phrase in the Income Tax Act, and, indeed, in other connexions in which the words are used, inasmuch as it introduces the element which is contained in the words "together as man and wife." Not merely must they have resided, and ordinarily resided, but they must have resided together as man and wife, and it must be true to say of the last occasion when that can be said of them that that event took place in England. That is a condition precedent to the jurisdiction under this Act.

"Residing together as man and wife," in the language of the Divorce Court, is sometimes called cohabiting, and I should find

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⁶ [1928] A.C. 217.

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a great deal of difficulty in distinguishing between residing together as man and wife and cohabiting. I do not think one carries it any further by paraphrasing it, but I suppose the words "last ordinarily resided together as man and wife in England" could be paraphrased by saying that the matrimonial home at which they last cohabited was in England. It is important, also, perhaps, to notice that it has not to be in any particular part of England, or any specified place. It is sufficient if it is established that it was in England, but naturally the evidence will point to some particular place in England as being the one properly to be called the matrimonial home at which they last cohabited.

It so happens that the house of the wife's mother was the first matrimonial home, and not only the first, but was the matrimonial home on many occasions. [His Lordship referred to the history of the marriage and to the circumstances of the separation in 1947, as found by the magistrate, and continued:] The magistrate found that they were reconciled. There was evidence that they slept together in London as man and wife, and the matter was left, according to the wife, that she would join her husband wherever he could find a home for her; and the place where he could find a home for her would depend to some extent, according to the evidence, on the locality of his next job. The wife's evidence was that he told her that he did not know where his job would take him, but it was understood that she should join him where he settled. He left to go to his work, and she has not heard from him since, though he sent 30s. a week for the two children.

That was the desertion complained of. The cohabitation [in 1947] was found by the magistrate to have been their last residence together as man and wife, and it was from that cohabitation that the desertion in question took place.

It has been said that there is no evidence to support that finding, because there was no element of permanence in this residence, nothing which, in the words of Harman J. in dealing with an adoption case,⁷ could be regarded as a headquarters which had any air of permanence about it. Therefore it was argued that it was not open to the magistrate to hold that there was a residence together as man and wife. I do not agree with that submission. There is such evidence, and I think that it is very important in this case to bear in mind what it is that the magistrate has found about this reconciliation. She has, in effect,

⁷ *In re an Adoption Application* [1952] Ch. 16, 25.

accepted the evidence of the wife that these two people deliberately came together again and resumed cohabitation as man and wife on the terms, and in the expectation, that wherever his job took him, wherever, in other words, his employers ordered him to go, he would settle down and she would join him there. I see no reason whatever to suppose that that meant anything else but a continuance of this resumed cohabitation in England. I do not say that it was necessarily stipulated that it should be in England, but everything shows that that was what was expected, and there is nothing to show that the contrary was expected. There was some suggestion by the husband, and it was put to the wife and rejected by her, that the understanding was that they must go and live at Dundalk; but the wife does not accept that.

If I may quote a passage, which has been approved, from my own judgment in *Mummery v. Mummery*,⁸ I said something to the effect that the whole question turned on what a resumption of cohabitation meant, and that Lord Merrivale P. had said more than once that no judge had ever attempted to give a comprehensive definition of desertion and probably no judge had ever succeeded in doing so, but that among the descriptions of desertion which he (Lord Merrivale) had given was one which always appealed to me. Lord Merrivale P. had said in *Pulford v. Pulford*⁹ that desertion was a withdrawal not from a place but from a state of things, and I added¹⁰: "Similarly, I doubt whether any judge could give a completely exhaustive definition of cohabitation, and certainly I am not going to attempt to do so, but at least a resumption of cohabitation must mean resuming a state of things, that is to say, setting up a matrimonial home together, and that involves a bi-lateral intention on the part of both spouses so to do."

In my opinion there is ample evidence in this case that when the husband rejoined his wife, in circumstances that the magistrate has found resulted in a reconciliation between them at the mother's house in 1947, there was a bi-lateral intention of setting up a matrimonial home together which did not merely consist in staying for a night, so to speak, as a lodger in a particular set of rooms or in one room, but which had an element of permanence about it; and there was a further intention, as I find on the evidence, of continuing that cohabitation elsewhere, wherever his employers should send him and he was able to settle down, on

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⁸ [1942] P. 107, 109.¹⁰ [1942] P. 107, 109.⁹ [1923] P. 18.

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the understanding that the part of the world in which that would occur would still be England, though not necessarily in London.

That being so, the magistrate had ample evidence on which to found jurisdiction to decide this case. Another matter that goes to show that that is so is that it is the true foundation of the finding of desertion which the magistrate has made. In my opinion that finding is not seriously challenged.

Therefore I think this appeal fails, and should be dismissed.

PEARCE J. I agree with all that my Lord has said. In *Levene v. Commissioners of Inland Revenue*,¹¹ in dealing with the words "ordinarily resident" for the purposes of the Income Tax Act, Lord Cave L.C. pointed out that in such cases the question is always one of fact and degree. "Ordinary residence can be "changed in a day," said Somervell L.J. in *Macrae v. Macrae*.¹² The question has to be decided in the light of all the attendant circumstances. In considering whether there has been enough of the quality of continuity and permanence in the two nights that the husband spent with the wife in this case, one must remember that the income tax cases deal with different words from those which we have in this case, which are "ordinarily resided together as man and wife." A night spent at an address by a solitary traveller does not carry so much weight or consequence as that spent by a husband who returns to and is reconciled with a wife in the home where they have lived together in earlier days before their estrangement. The husband in such a case has returned not only to an address but to a state of things.

In my view it is impossible to say that there was no evidence in this case on which the magistrate could properly come to the decision at which she arrived. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Teff & Teff; Philcox, Sons & Edwards.*

J. B. G.

¹¹ [1928] A.C. 217.

¹² [1949] P. 397, 403.

SNELLING v. SNELLING.

1952
May 21;
June 10.

Divorce—Maintenance—Wife's remarriage—Application after second husband's death—First husband's liability—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 19.

Wallington J.

The remarriage of a wife after decree absolute does not deprive her of her right to apply for maintenance against her former husband.

Bellenden (formerly Satterthwaite) v. Bellenden [1948] 1 All E.R. 343 applied.

SUMMONS (adjourned into court).

The parties were married in 1927. By her petition dated July 24, 1951, the wife prayed for a decree of divorce on the ground of adultery. The husband filed an answer and cross-petitioned for a decree of divorce on the grounds of desertion and adultery. At the trial on November 19, 1951, the prayer in the answer was rejected, the wife was granted a decree nisi and the party cited was dismissed from the suit. The decree was made absolute two days later, on November 21, and the wife remarried on November 26, 1951. Two days later the second husband died. On December 18, 1951, the wife filed an application for maintenance against her first husband, and a nominal order was made by the registrar for maintenance at 1s. a year. That award (which was all the wife asked for) was made in view of certain provisions made for her by her deceased husband. The husband appealed, submitting that the wife was not entitled to an order in view of her remarriage.

Gordon Friend and *Owen Stable* for the husband.

R. C. Chope for the wife.

Submissions by counsel are summarized in the judgment.

Cur. adv. vult.

WALLINGTON J., reading his judgment, stated the facts and continued:—Mr. Friend, on behalf of the husband, relied on two points, both of them, he says, points of principle. The first is that in consequence of the wife's remarriage it was not open to the court to entertain an application for maintenance against the husband because the effect of the statute dealing with this matter and of the decisions of the court, particularly three to which I will refer presently, is that there is an absolute bar to

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the jurisdiction of the court to grant maintenance to a wife who has remarried. That was put on a variety of grounds by Mr. Friend in his able argument, but the main ground was this: inasmuch as before the divorce the wife had all her common law rights in respect of her husband's liability to maintain her, as a result of the divorce she lost those rights because he ceased, of course, to be her husband, with the destructive effect (Mr. Friend argued) that when she essayed to marry a second time she had obviously given up, or confirmed the giving up, of her common law rights against her husband and acquired and accepted in lieu thereof similar rights against her new husband. On these grounds first of all Mr. Friend based his submission that the jurisdiction of the court in a matter of this sort disappeared on her remarrying.

Another, but incidental, though not unimportant, part of his argument was that it is the obligation of the court in dealing with an application of this kind, if it has jurisdiction, to decide whether any order for maintenance should be subject to a *dum sola* clause or whether it should be for the life of the wife. Mr. Friend's argument on this point ran on these lines: inasmuch as the court is obliged to decide as a matter of discretion whether any order made is to be a limited one or is to run for the whole term of the wife's life, it follows that if the wife has remarried she has thereby put it out of the possibility of the court to exercise the discretion as to what shall be the duration of any order it would make, and on this supplementary ground he argued that in this case this point, if not conclusive in itself, is at least support for his argument that the court is without jurisdiction after a wife has remarried.

On the other hand, Mr. Chope, for the wife, in his very clear argument, relied upon the provisions of the statute, section 19 of the Matrimonial Causes Act, 1950, and submitted that the whole matter rested upon the interpretation of that section and that the court must look only at that section and the authority conferred by it in order to ascertain whether in any case it will or will not make any, and what, order in respect of maintenance. Both sides relied on a number of authorities and both sides agree that this precise point has not been hitherto before the court. There being, therefore, no decision upon the question, I am invited to express my opinion about it, and I proceed to do so.

By section 19 of the Matrimonial Causes Act, 1950, provisions are made similar in all material respects to provisions dealing with the same or similar matters in and from the Matrimonial

Causes Act, 1866. The various statutes are the Matrimonial Causes Act, 1866, s. 1; the Matrimonial Causes Act, 1907, s. 1; the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, and the Matrimonial Causes Act, 1950, s. 19. I do not propose to go into those various sections, but it will suffice if I say that for all practical purposes the substance of those sections from time to time is the same as the provisions contained in section 19 of the Matrimonial Causes Act, 1950, or that they are so similar in expression as to be indistinguishable in effect, for any practical purpose, from the provisions of that section.

Section 19 (1) provides: "On any petition for divorce or nullity of marriage, the court may make such interim orders for the payment of alimony to the wife as the court thinks just." That is the initiation of this matter, providing discretion for the court pending the hearing of the suit, after the filing of the petition, to make such interim orders as the court may think just.

By subsection (2): "On any decree for divorce or nullity of marriage, the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable. . . ."

By subsection (3): "On any decree for divorce or nullity of marriage, the court may, if it thinks fit, by order direct the husband to pay to the wife, during their joint lives, such monthly or weekly sum for the maintenance and support of the wife as the court may think reasonable, and any such order may either be in addition to or be instead of an order made under the last foregoing subsection." That means that under both the subsections the court has a discretion to make an order either wholly or partly secured, or wholly unsecured, for the maintenance and support of the wife as the court may think reasonable, and the basis upon which the court has jurisdiction to deal with it is that it may "secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable." There is no doubt in my mind that the provision in this third subsection for unsecured maintenance must be governed as to the exercise of discretion by the matters set out in the second subsection.

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Mr. Friend's argument was very largely based upon three cases. First there was *Fisher v. Fisher*¹ (particularly at p. 414), and *Sidney v. Sidney*.² Mr. Friend submitted that the first of those cases decided that even though a petitioning wife may have been the guilty party she is not to be left destitute, and that the second of them decided that it would be unjust in fact for a wife to purchase the remedy of divorce by a surrender of her rights to maintenance³; and he argued that it followed that those are the matters at which the court ought to look in order to decide whether there should be an order, and, if so, for how much.

I am bound to say that I am unable to follow him in that argument. All those considerations were matters which affected the minds of the judges, but, in my opinion, they were matters which affected their minds not as the basis upon which maintenance should be ordered but as matters affecting the reasonableness of the application for maintenance, i.e., as part of the circumstances of the case, part of what is referred to or included in the section as the conduct of the parties. They were not fundamental in the sense that they were decisive as to the existence of the right to order maintenance.

Then he argued that the effect of those cases of *Fisher v. Fisher*⁴ and *Sidney v. Sidney*,⁵ and also *March v. March and Palumbo*⁶ (particularly at p. 442), is that the wife, having by proceedings deprived herself of her rights of necessity, by remarriage acquired a substituted set of rights, namely, those against her second husband.

In his final submission he contended that by the judgments in those three cases the court itself has limited or authoritatively established the principle that the jurisdiction of the court is restricted to cases in which application for maintenance is made before remarriage. That is a proposition which I am unable to accept. In my clear opinion none of those cases has, nor have all of them together had, the effect of limiting or establishing any such principle as he suggests which in any way restricts the jurisdiction conferred on the court by the statute under which the court acts and from time to time always has acted.

Mr. Chope cited *Bellenden (formerly Satterthwaite) v. Satterthwaite*.⁷ That was a case in which "a wife, having been granted a decree of divorce against her husband, obtained a

¹ (1861) 2 Sw. & Tr. 410.⁵ 4 Sw. & Tr. 178.² (1865) 4 Sw. & Tr. 178.⁶ (1867) L.R. 1 P. & M. 440.³ Ibid. 180.⁷ [1948] 1 All E.R. 343.⁴ 2 Sw. & Tr. 410.

“ maintenance order providing for the payment to her of £400
 “ a year, less tax, during the joint lives of herself and her
 “ husband or until further order. Later, both parties remarried
 “ and the order was varied by the registrar, the payment under
 “ it being reduced to the nominal sum of one shilling a year.
 “ This order was affirmed by the judge. The wife appealed
 “ on the grounds (a) that the registrar and the judge had
 “ applied a wrong principle of law, and (b) that, having regard
 “ to the evidence, the low figure of one shilling must be wrong
 “ and the result of the order was manifestly unjust.” The
 matter came before Willmer J. on appeal from the registrar,
 and he affirmed the registrar. The case went to the Court of
 Appeal and in the course of his judgment Asquith L.J. made
 these observations^s: “ To revert to the wife’s contentions. The
 “ first was that the registrar—whose order the judge affirmed
 “ without giving reasons—misdirected himself, or applied a
 “ wrong principle of law, or adopted a wrong approach to the
 “ question—all different ways of expressing the same thing.
 “ The only indication of the principles of approach of the
 “ registrar is contained in the first two or three lines of a judg-
 “ ment which can hardly have exceeded six. According to
 “ counsel’s note, he said: ‘ I have to look at all the circum-
 “ stances, including the financial position of all the parties.’
 “ So far, this direction seems unimpeachable, reproducing, as it
 “ does, the substance of section 14 (2) [of the Administration of
 “ Justice (Miscellaneous Provisions) Act, 1938]. Then follow
 “ the words complained of: ‘ The wife chose to marry again,’ and
 “ then follows the decision. It is conceded that if the registrar
 “ had said: ‘ She has, in fact, married again,’ his language would
 “ have been wholly free from objection. I am not satisfied that
 “ the registrar meant any more than this. Most certainly he did
 “ not mean that the remarriage of a woman, as such, and without
 “ more, is a ground for reducing her maintenance to nothing or
 “ its equivalent. All he meant, in my judgment, was that it was
 “ a relevant factor in so far as it increased her means in money
 “ or money’s worth. The case was elaborately argued before
 “ Willmer J., who confirmed the decision of the registrar,
 “ though, as I have stated, without giving any reasoned judg-
 “ ment of his own. In the circumstances, and having heard the
 “ arguments before the court, which I understand were put also
 “ to the learned judge, I am satisfied that there is no ground for

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^s [1948] 1 All E.R. 343, 344-5.

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“ saying that Willmer J., any more than the registrar, mis-
“ directed himself or exercised his discretion on any wrong
“ principle. There is, accordingly, no substance in the suggestion
“ that the learned judge or registrar applied a wrong principle
“ of law, but the application of a wrong principle of law is not
“ the only ground on which the exercise of this judicial discretion
“ may be challenged.” He then deals with another aspect of
the case which does not affect the case before me.

Evershed L.J. made these observations in the course of his
judgment⁹: “ No formal judgments were given either by the
“ registrar or by the judge, but save in one respect it has not
“ been suggested to us that either registrar or judge paid regard
“ to matters which should have been disregarded or disregarded
“ matters which should have been taken into account, or, indeed,
“ otherwise misdirected himself in fact or law. The one alleged
“ exception is that, according to a brief contemporary note, the
“ registrar used the phrase ‘The wife chose to marry Dr.
“ ‘ Bellenden.’ It was urged by counsel for the wife that by
“ this language the registrar must be taken to have inferred that
“ by the mere act of remarriage the wife forfeited the rights
“ which she had to the receipt of any maintenance from her
“ former husband, and that this error on the part of the registrar
“ must be taken to have infected also the decision of Willmer J.
“ I do not agree, nor do I accept counsel’s interpretation of the
“ phrase of which the registrar made use. I, therefore, find no
“ grounds sufficient to entitle, still less to compel, this court to
“ say that the registrar did not, or that the judge did not, in
“ accordance with subsection (2) of section 14 of the Act of 1938,
“ properly and to the best of his ability consider and weigh all
“ the circumstances of the case including the changes in the
“ resources and prospects of the wife and the husband as a result
“ of their respective remarriages.”

Before I leave that case I had better just cite the provision in
section 14 of the Administration of Justice (Miscellaneous Pro-
visions) Act, 1938. Those provisions are these: “ (1) Where
“ under the Supreme Court of Judicature (Consolidation) Act,
“ 1925, the court has made . . . an order under section 190 (2)
“ of that Act . . . the court shall have power to . . . vary the
“ order. . . . (2) In exercising the powers conferred by this
“ section the court shall have regard to all the circumstances of
“ the case, including any increase or decrease in the means of
“ either of the parties to the marriage.”

⁹ [1948] 1 All E.R. 343, 345-6.

I need not devote any further attention to that provision; it means merely that after the court has dealt with a matter and made an order under the provisions of section 190 of the Act of 1925 (which, as I have said, is similar in all respects to the section in the Matrimonial Causes Act, 1950), then, on an application properly made, variations may be made in the order and the court must consider such an application to vary an existing order "having regard to all the circumstances of the case."

It is plain, in my opinion, from the judgments to which I have referred, and in particular the parts of them which I have read in *Bellenden's* case,¹⁰ that the Lords Justices were firmly laying it down that the remarriage of a wife who seeks to obtain (in that case a wife who had in fact obtained) an order for maintenance is not enough to put an end to her right to apply for and, in a proper case, to obtain a maintenance order against her first husband.

There is in the report of this case no suggestion that they based that opinion upon the mere fact that she had obtained an order. They expressed it in terms which, in my view, they intended to mean and which in fact must mean that remarriage may have an effect upon quantum, either putting it up or putting it down according to the circumstances of the case, but that remarriage can have no further effect upon the matter than that; in other words that the fact of remarriage can in no circumstances nullify an order which has been made or preclude the making of an order which is applied for on a proper application to the court.

It is true that up to now there has been no decision directly on the question whether the remarriage of a wife has the effect of depriving her of any right to apply successfully for an order for maintenance, but, for the reasons I have given, I entertain no doubt that her remarriage had no effect at all upon her right so to apply.

In this particular case the circumstances of her second marriage made it unnecessary for her to press for a substantial order for her maintenance because her second husband, with whom she lived for such a tragically short time, had left her financially so placed that she could get along without any resort to the respondent husband in this case. It is plain that these orders are made "until further order," and they, all of them, are subject to variation. It is not impossible that some tragedy may befall this lady so that within weeks or months or perhaps years her fortune

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¹⁰ [1948] 1 All E.R. 343.

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may disappear, whatever it is, and she may well have to resort to the court for an increase in the present nominal order for maintenance.

The second and rather subsidiary point made by Mr. Friend was that the provisions of the section cannot be operated by the court if the wife remarries before she applies for maintenance, because it is impossible for the court then to consider whether the order it is about to make is to be a limited one or a permanent one; it seems to me that that is merely incidental. It may be that there are cases quite apart from those in which, now for the first time, apparently, a wife has remarried, in which the court may have to consider whether to make a limited order or an order for the life of the wife, and I can see, for myself, no limit to what the court may do in the exercise of its judicial discretion, for the words of the section are: "such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable. . . ."

This provision is so wide in its terms that, in my opinion, there can be no question at all that in operating it the court must regard a remarriage as one of the incidents coming within "the conduct of the parties" and within "all the circumstances of the case"—a circumstance which may be to the advantage of the wife, or may be to the advantage of the husband, as in this case it has been owing to the better financial position of the wife which the second marriage has produced.

This appeal must, accordingly, be dismissed.

Appeal dismissed.

Solicitors: *Champion & Co., for Turberville Smith & Co., Uxbridge; Bentley Taylor & Stevens, Harrow.*

J. B. G.

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July 9.

MURCUTT v. MURCUTT.

Willmer J.

Husband and Wife—Injunction—Jurisdiction—Husband's proceedings in the county court to evict daughters—Application in High Court to restrain proceedings—Divorce petition on the file.

A wife who had presented a petition for divorce on the ground of cruelty, but who had remained with the two grown-up daughters

of the marriage in the matrimonial home of which the husband was the tenant, and in which he still resided, sought an injunction to restrain the husband from proceeding with an action in the county court to evict the daughters, one of whom was in ill-health. She contended that the practical effect of such an order would be to force her to leave as well; and her petition in fact contained an allegation that the husband had threatened to turn the daughters out for this purpose:—

Held, that the injunction sought should not be granted. Although the court had jurisdiction to make the order asked for, it would be a most unusual one to make, for the county court was the appropriate court to deal with the matter, and the action itself was not between the parties to the suit. The order ought only to be made if the applicant for the injunction would otherwise suffer irreparable harm. If the wife left, she would do so not in pursuance of a legal duty, but because of her affection for her daughters, although if she were forced in this way to find other accommodation, that was a matter to be taken into consideration on an application for alimony pending suit; and if the wife obtained a decree (as she would if her allegations were accepted), she would have to leave the house in any event. Such circumstances did not warrant the remedy which the court was asked to grant, and the application should accordingly be dismissed.

SUMMONS for an injunction.

A wife presented a petition for divorce on the ground of her husband's alleged cruelty. The parties continued, however, to live in the matrimonial home, of which the husband was the tenant, with the two daughters of the marriage, both aged over 21, and two grandchildren. The elder daughter was a married woman whose husband was serving abroad; the younger was unmarried and had always lived at home. It was said that she was not "very bright mentally" and that she suffered severely from asthma, so as to need a good deal of attention from her mother, on whom she relied.

The husband instituted proceedings in the Southend County Court to evict both daughters, and the wife applied for an injunction to restrain the husband from proceeding with these actions pending the hearing of the matrimonial cause. She submitted that, although the proceedings for eviction did not affect her own position in law, the effect of those proceedings, if successful—and it was conceded that they must be—would be to force her to leave the matrimonial home in order to be with her daughters. The action was therefore indirectly a proceeding against her to obtain her eviction.

The petition contained an allegation that the husband (prior to the county court proceedings) had said to the wife that he

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would turn the daughters out by a court order, and that when they went she would go too.

The wife further sought an injunction to restrain the husband from molesting her; but as his willingness to give an undertaking not to do so was expressed in court, no question arose on that issue.

The county court action was due for hearing on the day following this application.

Brian Gibbens for the wife. I ask for this injunction in order to maintain the status quo pending suit. I must concede in this court that there is no defence to the husband's claim in the county court, since the daughters are licensees whose licence has been revoked. But the husband's action is injurious to the wife and is part of the course of conduct alleged against him; his object is to force the wife, as well as the daughters, to leave. Up to now the wife has always enjoyed a right to have her children with her.

The court may grant an injunction to stay collateral matters which go to the fount of the issue: *Ratcliffe v. Winch*,¹ where it was held that "after a decree or order on summons for the "administration of an estate, a legatee will be restrained from "proceeding in the county court to recover a legacy, and that "notwithstanding the legatee submits to take a judgment against "the executor de bonis propriis, alleging a devastavit." An analogy may be found in *Hollywood Silver Fox Farm Ltd. v. Emmett*,² where it was held that an act otherwise lawful if done maliciously with intent to injure another was ground for an injunction; for although the husband is acting in accordance with his legal rights, he is acting with a malicious intent.

[He referred to *Shipman v. Shipman*³; *Boyt v. Boyt*⁴; *Richman v. Richman*⁵; *Willmott v. Willmott*⁶; *Callaby v. Callaby and Perowne*.⁷]

[WILLMER J. Nevertheless the action here is not against the wife, for she is not bound in law to go herself if her daughter goes.]

The husband is taking these steps in order to force the wife to leave, and though the circumstances are different his action is comparable to that of the landlord in *Lavender v. Betts*,⁸ who

¹ (1853) 16 Beav. 576.

² [1936] 2 K.B. 468. And see note to Ord. 50, r. 6, "Legal Rights."

³ [1924] 2 Ch. 140.

⁴ [1948] 2 All E.R. 436.

⁵ [1950] W.N. 283.

⁶ [1921] P. 143.

⁷ (1920) 37 T.L.R. 241.

⁸ (1942) 167 L.T. 70.

tried to force a statutory tenant to leave by interfering with his quiet enjoyment of the premises.

The purpose of an injunction is to maintain the status quo pending a decision upon the real issue. [He referred also to *Orr-Lewis v. Orr-Lewis*.⁹]

Robin Dunn for the husband. Although section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925, gives very wide powers to the court, there appears to be no precedent for the granting of an injunction such as this where the proceedings are not between the same parties and are in an inferior court. I submit that the power of the court under the section is not entirely unfettered and that it would be a dangerous precedent if the door were opened to an injunction of the nature asked for in this case.

The essence of the decision in *Hedley v. Bates*¹⁰ is that the matter in issue must be between the same parties. See also *Stannard v. Vestry of St. Giles, Camberwell*.¹¹

Gibbens in reply.

WILLMER J. This is a case in which I could have wished, had I had the opportunity, to consider my judgment. As it is, I am informed that my decision, if it is to be of any value, must be given today, or not at all; therefore I propose to give my decision at once, although I shall not attempt to give my reasons otherwise than very briefly. [His Lordship stated the facts and continued:] It is in those circumstances that I am asked to grant an injunction restraining the husband, not only from evicting the wife, but also from proceeding with the county court actions to evict his daughters.

The matrimonial home is in fact the husband's home, in the sense that he is the tenant of the house. The order I am asked to make is admittedly of a most unusual nature. As I understand it, I undoubtedly have jurisdiction to restrain the husband from proceeding with the actions which he is pursuing in the county court. But it would certainly be a very unusual order to make, particularly having regard to the fact that the county court is the appropriate court with jurisdiction to deal with such actions, and also having regard to the fact that the proceedings which I am asked to restrain in that court are not proceedings between the parties to this suit, but are between different parties.

A number of cases have been cited to me, and I think that

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⁹ [1949] P. 347.

¹¹ (1881-2) 20 Ch.D. 190, 196-7.

¹⁰ (1880) 13 Ch.D. 498, 501.

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I am right in saying that in none of them has an injunction been granted to restrain proceedings between different parties in a court having jurisdiction to deal with them. I apprehend that an unusual, and indeed extreme, order of the kind sought in this case ought only to be made if I am satisfied on the evidence put before me that in the absence of any such order the wife would suffer irreparable harm between now and the trial. I have to ask myself the question whether anything of the sort, or anything approaching that, has been shown by the wife in this case.

In the first place it is to be observed that, if the husband succeeds against the daughters in tomorrow's proceedings, the result will be legally binding on the daughters, but the wife, the present petitioner, will in no way be legally bound to leave the matrimonial home, or to go with her daughters or either of them. She will be free to go or to stay as she may be advised. It may very well be that the bonds of affection that exist between her and her younger daughter will probably have the result that she will go wherever the daughter goes; but that would be not in pursuance of any legal duty but merely in pursuance of normal human affection. I ask myself the question, if it is right to stay proceedings in the case of daughters, where is the line to be drawn? Suppose that the person sought to be evicted was not a blood relation, but somebody of whom the wife was known to be very fond, somebody perhaps with whom she had lived for a great length of time and who was very dependent upon her. Is it competent to restrain proceedings against some such defendant as that? It seems to me that if I admit the right to an injunction in a case like this, where the person sought to be evicted is a daughter, it would be very difficult to draw any line beyond which the court would not in appropriate circumstances go. That is the first point that troubles me, namely, that the wife is not in law obliged to go. How far am I to consider the question whether of her own volition she is or is not in fact likely to go—a matter which depends, not on any legal duty, but only on the bonds of ordinary human affection?

The next question which troubles me is this. If I assume that the actions will succeed tomorrow I apprehend that the two daughters will not be ordered on to the streets forthwith, but that they will be given a reasonable time in which to find alternative accommodation. If, therefore, the wife makes up her mind that she wants to leave with the younger daughter, she will have an opportunity of finding alternative accommodation in the same way as the evicted daughters will have. The accommodation she

obtains will depend largely on the financial support which the husband is prepared, or may be forced, to accord to her; and it may be that upon any view the wife would be well advised to press ahead with all speed for the purpose of obtaining an order for alimony pending suit, if she has not already done so. I am not apprised of the situation in regard to that, nor have I any information as to what her husband's means may be. But if the husband by his conduct in effect forces his wife to leave the matrimonial home and live elsewhere at greater expense, that is a matter which will have to be taken into consideration in fixing the amount which the husband ought to pay. The point I am concerned with at the moment is that there will be time to consider that question, because the daughters will not be turned out into the street tomorrow, even if the actions against them succeed.

The third thing which troubles me is this: I must assume the truth of the wife's statements, and the virtue of her case, for the purpose of this application. She is entitled to be judged on what she herself says, and if what she says is right she will, I should have thought, inevitably obtain a decree in the present suit. If she obtains a decree, she will cease to have any right to live in the matrimonial home; and it will not avail her then to say that her daughter suffers from a complaint such as asthma. In other words, assuming the truth of the wife's case, the moment is inevitably and inexorably approaching when she will in any case have to leave the matrimonial home. The only question is whether the husband should be stopped from taking steps which may indirectly produce that result now, or whether it should be postponed until the time when the wife has obtained the decree to which, she says, she is entitled. That seems to be the sum total of merit of this application.

I hope that I have not stated the matter unfairly; but in view of the considerations which I have mentioned, in my opinion the circumstances fall far short of anything which would warrant the very unusual remedy which I am asked to grant in this case. In my judgment, therefore, this application, so far as it concerns the restraining of the proceedings in the county court, ought not to be granted. The first part of the application, I understand, is covered by the undertaking that Mr. Dunn is ready to give.

Application refused.

Solicitors: *Henry Flint, Southend-on-Sea; Shelton, Cobb & Co.*

J. B. G.

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June 24.

Lord Merri-
man P. and
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HAYNES v. HAYNES.

Husband and Wife—Justices—Cruelty—Revocation of non-cohabitation clause—Locus poenitentiae—Mental cruelty—Parental interference—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), ss. 5 (a), 7.

There is no legal impediment to an application under section 7 of the Summary Jurisdiction (Married Women) Act, 1895, for a variation of an order made on the ground of persistent cruelty by the elimination of a non-cohabitation clause. If a husband is prepared to make amends and approaches his wife in that frame of mind, those circumstances will amount to fresh evidence on which the court may vary the order in this respect as in others. Each case must be considered on its merits, and as in cases of constructive desertion, it is a question of degree what amends a husband must be prepared to make before he can suggest that his wife should take him back.

Hutchison v. Hutchison [1951] W.N. 296, *Edwards v. Edwards* [1948] P. 268 applied.

A husband was found by a court of summary jurisdiction to have been guilty of persistent cruelty, and an order was made containing a non-cohabitation clause. The burden of the wife's complaint was that the marriage had been broken up by the interference of the husband's parents, who dominated him, and whose part he took when the wife informed him that she could stand it no longer because of the effect upon her health. She complained in particular of the interference by the husband's parents in the upbringing of the child of the marriage. The husband appealed against the inclusion of the non-cohabitation clause: but it was conceded that it would be difficult to contend on an appeal that there was no evidence to justify a finding of persistent cruelty.

Held, that although the order should not be modified by the deletion of the non-cohabitation clause, it must be understood that the door need not necessarily be bolted and barred for ever. If the husband could realize the error of his ways, could see his wife's point of view and provide some reasonable assurance that in future he would respect her natural desire for independence as a wife and as a mother, there was no reason why the parties should not resume married life together; and if the husband's conduct gave reason to believe that that result could be achieved, the justices might favourably consider an application for the removal of the non-cohabitation clause.

APPEAL from Banbury borough justices.

The parties were married at the end of 1947. The burden of the wife's complaint, as summarized by Lord Merriman P., was as follows: It was a case of what is conveniently called, with the authority of the House of Lords, "mental cruelty," and the

wife's complaint was that in spite of the finding that she was perfectly competent to look after her child, this marriage was broken up by the interference of the husband's parents, who appear to have dominated him, and, in particular, to have "got at" the wife, as she put it, through the child, so as to make her life intolerable. The husband's mother had been a trained children's nurse, and the wife complained that she practically never let the child alone, that she was in and out the whole time, and that she was always criticizing the wife, especially in respect of her upbringing of the child. What was worse, so far from taking her part and protecting her from that kind of interference, when finally she complained about it and said that she just could not stand it any longer because it was breaking up her health (a fact which a doctor confirmed), the husband abused her and took his parents' side against her the whole time, until she could not stand it any longer. She left him in January, 1952, and issued a summons on the ground of persistent cruelty.

On March 31, 1952, the justices made an order and included a non-cohabitation clause. They gave the wife the custody of the child of the marriage, a girl just over two years of age.

The husband appealed.

Norman Lermom for the husband.

Anthony L. Gordon for the wife.

LORD MERRIMAN P. referred to the findings of the justices and said:—The essence of the case is this. It is conceded that it is very difficult to argue that there was not evidence which, if accepted, as it was, justified the finding of the justices that the wife had been subjected to a constant course of conduct of such a kind as to make her continuously miserable, and cause her serious loss of health; but it is contended, on the assumption that it is not possible to upset that finding, that in this case it was not right to make a separation order, even though the finding was one of persistent cruelty. In view of the hope that I entertain that it may not yet be too late to save this marriage, which only took place at the very end of 1947, I propose to deal as shortly as possible with the facts on which the wife based her case. [His Lordship stated those facts, as set out above, and continued:] That very brief outline of the facts, which was supplemented by the very frank admission of the husband's mother that she had never liked the wife, by the admission of the husband that he did not love his wife but would in certain circumstances try to

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do so, and not least by his categorical admission that the wife was suffering untold agonies because his parents interfered with the child, and that when she said she was miserable because she wanted the child to herself he called her a miserable devil, and so on, makes it appear that the parents were dominating this marriage. Nobody can complain, obviously, of the parents helping to furnish the house, or helping to clothe the child, or to clothe the wife, for that matter, but there are ways of doing these things which are right, and there are ways which are not likely to lead to anything but friction. One would have thought that the way likely to be most helpful to promote the marriage would be to say to the young people, "Well, we are prepared to go to such and such a figure. Now you go and choose the furniture yourself. Mind you, if we think it is perfectly horrible we shall say so. But still, it is going to be your home. You choose the furniture." Instead of which, apparently without a word to the wife, the furniture was chosen without her having any say in the matter, and just arrived; and the same thing happened about clothes.

These sound small matters, but, of course, it is the accumulation of such matters, and the fact that the husband always stuck up for his parents and did not take his wife's side, that he abused her and called her all sorts of names if she showed the slightest resentment about it, which is the real gravamen of this case. I am not going to describe it as a case of extreme cruelty; it is obviously a case which is near the line. But the justices have found the facts, and, in effect (for I do not want to put it too high), it was virtually admitted that it would be very difficult for us to reverse their finding. That is my opinion also.

The real difficulty in this case, which has caused me a certain amount of anxiety, is this: whether or not this is a proper case for a separation order, bearing in mind in particular that except for a laudable attempt on the part of the solicitors on both sides to bring about a reconciliation, which lasted a few weeks before the final parting, no outside influence has been brought to bear, so far as I know, in an attempt to save this marriage. So long, of course, as this non-cohabitation clause remains in the order it is a bar to any serious attempt by the husband to get his wife back, because she is not obliged to receive him. Nevertheless, I feel a difficulty. It is a case to which the justices have given a very patient and careful hearing, and have obviously come to the conclusion that a separation order was the proper result, and

I feel great diffidence in saying, as the case was presented to them, that they were wrong. But though I am not prepared to modify the order by eliminating the non-cohabitation clause, as the case is presented to us merely on paper, I do think it is highly desirable that it should be understood by everybody that the door need not necessarily be bolted and barred for ever.

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Reference has been made to some observations which I am reported as having made in *Hutchison v. Hutchison*,¹ in which, after adhering to what I am reported to have said in *Edwards v. Edwards*² in relation to the kindred topic of constructive desertion, where I was trying to point out that every case must be dealt with on its merits and that it is a question of degree what amends it may be open to the husband to make and upon which the wife may insist before any question of a resumption of cohabitation arises, I am reported to have said³: "I do not take the view that as a matter of degree the circumstances of this particular case entitle the wife to sit down on her order for all time, and refuse ever to consider approaches, however humble, however contrite, however real, on the part of the husband to resume this all-too-brief married life. But they must be approaches which are made with a very clear realization that he has learned his lesson, and with the very clear realization that if that sort of conduct is repeated the wife will have a clear-cut case for reviving the charge of cruelty which she established before the condonation."

That passage describes my view about this case, although, of course, I recognize that so long as this non-cohabitation clause stands the wife can resist any overtures. But in my opinion it is open to the husband, if he has learned his lesson, if he is prepared to realize that it is his fault that this marriage has been broken up and that this separation order has been made, to approach the wife and the court in that frame of mind, and I know of no legal impediment to an application to the court under section 7 of the Summary Jurisdiction (Married Women) Act, 1895, for a variation of the order by eliminating the non-cohabitation clause. I am certainly not going to lay down or to dictate what the justices should do if that situation arises—and I must not be thought to be doing so—beyond calling their attention to the general observations to which I have already referred, and I think that that is the proper solution. I do not think that it is open

¹ [1951] W.N. 296.

³ [1951] W.N. 296, 297.

² [1948] P. 268, 272.

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to us to say that they were wrong in including the non-cohabitation clause in this order. I am merely pointing out that, given a new set of circumstances which, of course, will clearly amount to fresh evidence and good cause under the section, it is open to them to vary the order in this respect, as in other respects, and I merely add the obvious comment that if that case is presented to them they would probably think it was the right moment, before coming to any final decision, to invoke the assistance of their probation officer to see what could be done about pulling this marriage together before it is too late.

With those observations it only remains to add that as things are I see no reason for interfering with the decision of the justices, and the only result is that this appeal must be dismissed.

PEARCE J. I agree with all that my Lord has said. In this case there was evidence on which the justices could come to the conclusion at which they arrived.

The incidents complained of are less sensational than incidents of physical violence, but they are matters that can cause even greater unhappiness, and, in the long run, injury to health. This is an aggravation of a problem that is very prone to occur. The older generation, if they are too possessive, find it difficult to realize that the next generation want to lead their own lives and are entitled to have their own home life and bring up their babies, differently no doubt, and probably neither better nor worse, but in their own fashion. When matters go to the lengths to which they have gone in this case I think that the justices are entitled to call the husband's conduct persistent cruelty.

If the husband, as my Lord has said, can realize the error of his ways, can see his wife's point of view, and can provide some reasonable assurance that in future he will respect her rights both as a wife and as a mother, I see no reason why they should not be able to resume married life together. If his conduct gives reason to believe that that result can be achieved, I think the justices would favourably consider an application for the removal of the non-cohabitation clause.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co., for Dawe & Co., Kingston-on-Thames; Preston, Lane-Claypon & O'Kelly, for Cole & Cole, Oxford.*

J. B. G.

HOLLINGSWORTH v. HOLLINGSWORTH.

1952
June 25.

Husband and Wife—Practice—Petition filed within three years of marriage—Prayer for dissolution in answer—No further leave required—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), ss. 2, 6.

Collingwood J.

The restrictions imposed by section 2 of the Matrimonial Causes Act, 1950, on the initiation of a suit for divorce during the first three years after marriage relates solely to the petition and does not apply to a cross-prayer for dissolution in an answer; for the relief which the court can give to a respondent spouse under section 6 of the Act involves the assumption that he or she has in fact presented a petition.

No leave, therefore, is required to insert a cross-prayer for dissolution in an answer to a petition for divorce.

SUMMONS adjourned into court.

The parties were married in June, 1950. In January, 1952, the wife obtained leave under section 2 of the Matrimonial Causes Act, 1950, to present a petition for divorce on the ground of cruelty. By his answer, which was dated March 27, 1952, the husband denied that he had been guilty of cruelty and prayed for a dissolution of the marriage on the ground of the wife's cruelty. The petitioner took out a summons asking that the allegation of cruelty in the answer, and the prayer, be struck out. On April 17, 1952, the registrar dismissed the summons. The wife appealed solely in respect of the prayer for dissolution, on the ground that the husband had not obtained leave to ask for a dissolution of the marriage, contending that section 2 of the Matrimonial Causes Act, 1950,¹ applied to a cross-prayer for dissolution in the same way as to a petition.

John Mortimer for the wife.

Michael Hoare for the husband.

Cur. adv. vult.

COLLINGWOOD J., reading his judgment, stated the facts and continued:—The ground of the appeal is that the respondent has

¹ Matrimonial Causes Act, 1950, s. 2: "No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of the marriage: Provided that a judge of the court may, upon application being made

"to him in accordance with rules of court, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent. . . ."

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not obtained leave to ask for the dissolution of the marriage, and it is contended that section 2 of the Matrimonial Causes Act, 1950, applies to a cross-prayer for dissolution in the same way as to a petition, and that in default of leave the respondent has no right to insert a cross-prayer in the answer. I am unable to accept that contention.

[His Lordship read section 2 of the Act and continued:] That section relates solely to the petition, and is a restriction on the initiation of a suit for divorce during the first three years after marriage. The provision as to relief to a respondent on a petition for divorce is found in section 6.² [His Lordship read the section.] That is to say, the relief which the court can give involves the assumption that he or she has in fact presented a petition; it does not subject the answer to the restriction which is applicable to the presentation of a petition. Further, to subject the answer to such restriction would, it seems to me, have one of two possible results. Either, where leave was withheld because the respondent's case was not within the proviso to section 2 (1), the court would be precluded from doing justice as between the parties to the suit; or, leave would be given as a matter of course on the ground of exceptional hardship, and the application therefor would be a mere formality, with the attendant unnecessary expense.

Neither of these alternatives has anything to recommend it. In my opinion the registrar was right in the course he took and this appeal must be dismissed.

Appeal dismissed.

Solicitors: *G. E. C. Dougherty, Law Society Divorce Department; Warmingtons.*

J. B. G.

² S. 6: "If in any proceedings for divorce the respondent opposes the relief sought on the ground of the petitioner's adultery, cruelty or desertion, the court may give to the

respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief."

IN THE GOODS OF DAVIS, DECD.

1952
July 9.

Willmer J.

Probate—Revived by codicil—Will revoked by marriage to beneficiary—Codicil on envelope containing will—Statement that person named in envelope was testator's wife—Wills Act, 1837 (1 Vict. c. 26), s. 22.

The deceased wrote on an envelope in which was kept a will revoked by his marriage to the sole beneficiary: "The herein-named — is now my lawful wedded wife." These words were signed and attested in accordance with the provisions of the statute. The court was moved for an order that the will and codicil be admitted to probate.

Held, that in view of the attendant circumstances, coupled with the words used, the writing on the envelope was a codicil executed with the intention of reviving the will, and that both should accordingly be admitted to probate.

In the Goods of Steele, In the Goods of May, In the Goods of Wilson (1868) L.R. 1 P. & M. 575 followed and applied.

The proposition in that case that the intention of the deceased to revive a will must appear on the face of the codicil does not mean that evidence of attendant circumstances is not admissible.

PROBATE MOTION.

The deceased, Ernest Reuben Orton Davis, duly executed a will in October, 1931, whereby he devised and bequeathed all his estate to Ethel Phoebe Horsley, and appointed her his sole executrix. The will was not expressed to be in contemplation of marriage. In October, 1932, the deceased married Ethel Phoebe Horsley, and in May, 1943, he wrote on the envelope in which the will had been kept: "The herein named Ethel Pheboe (sic) Horsley is now my lawful wedded wife." Both the will of 1931 and the writing of 1943 were properly attested in accordance with the provisions of the Wills Act, 1837.

One of the witnesses to the document of 1943, Mabel Mary Horsley, proved the due execution of the codicil in an affidavit in which she further averred: "Before the deceased executed his said codicil the deceased informed me that he had made a will in favour of his wife . . . and that he had executed it approximately one year before their marriage. I told him that such a will would have been revoked by his marriage but could be made effective again by means of a codicil. The deceased thereupon produced the envelope hereinbefore referred to and extracted therefrom a document in the form of a will dated October 2, 1931, which I positively identify as the document

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"now produced. . . . The deceased then wrote out the said
"codicil upon the said envelope, executed the same as a codicil
"as hereinbefore described, and replaced the said will in the
"said envelope and sealed the latter. The deceased's wife was
"present throughout this."

The deceased died in November, 1951, and the applicant, the widow, moved the court for an order that the will and codicil be admitted to probate.

J. P. Hunter-Brown, for the applicant, cited *In the Goods of Steele, etc.*,¹ and *In the Goods of James Terrible, decd.*²

G. F. Dearbergh for certain persons interested on intestacy.

WILLMER J. stated the facts and continued:—I am invited to say that the effect of the document which was executed in the form of a codicil on the outside of the envelope containing the will was such as to show an intention to revive the will within the meaning of the provisions of section 22 of the Wills Act, 1837.³

[His Lordship read the material part of that section and continued:] The question which I have to determine is whether this writing of May, 1943, is a codicil, and, if so, whether it shows an intention to revive the will. Only so can I admit the documents to probate.

I have been referred to the case of *In the Goods of Steele, In the Goods of May, In the Goods of Wilson*.⁴ In that case the meaning of section 22 of the Wills Act was fully considered, and the effect of the decision, as I understand it, is summarized in one sentence of the headnote, the words of which are reproduced from those used in the judgment. I can therefore read them as amounting to the decision of this court. It was held "In order
"to satisfy those words [i.e., the words of section 22 of the Act]
"the intention must appear on the face of the codicil, either by
"express words referring to a will as revoked and importing
"an intention to revive the same, or by a disposition of the
"testator's property inconsistent with any other intention, or
"by some other expression conveying to the mind of the court
"with reasonable certainty the existence of the intention."

¹ (1868) L.R. 1 P. & M. 575.

² (1858) 1 Sw. & Tr. 140.

³ Wills Act, 1837, s. 22: "No
"will or codicil, or any part thereof,
"which shall be in any manner
"revoked, shall be revived otherwise

"than by the re-execution thereof, or
"by a codicil executed in manner
"hereinbefore required, and showing
"an intention to revive the same.
" . . . "

⁴ L.R. 1 P. & M. 575.

It would seem that three possibilities are there expressed. The first two do not arise in the present case, for there are no express words here referring to the will as revoked, nor is there any disposition of property contained in the purported codicil. The question remains whether it can be said that there is some expression conveying to the mind of the court with reasonable certainty the existence of an intention to revive the will.

To say that the intention must appear on the face of the codicil does not mean that evidence of attendant circumstances is not admissible; that, indeed, is made clear in another part of the judgment in the case to which I have just referred. If I may illustrate what I mean, evidence would clearly be admissible in the present case to identify the lady, Ethel Phoebe Horsley, and also of the fact that a marriage had actually taken place between her and the testator. I am, however, invited to go a little further and to admit and give effect to some evidence of another deponent, Miss Mabel Mary Horsley, who was a sister of the Miss Horsley referred to in the will. Miss Mabel Horsley says that shortly before the time when the purported codicil was executed she had had a discussion with the deceased, in the course of which she pointed out that the effect of his marriage was to revoke the will. It seems to me that that is one of the attendant circumstances which I am entitled to take into consideration when I approach the task of construing the words of the purported codicil, in order to decide whether or not they do show an intention to revive the will.

I was very much impressed with the argument of counsel for the applicant when he pointed out that one must assume that the testator intended to execute some sort of effective document when he executed the document of 1943; he cannot be credited with an intention to execute a wholly ineffective codicil to a wholly ineffective will. The words which he wrote refer specifically to what is written within, that is to say, within the envelope, and within the envelope was the will itself. It is pointed out, and I think with force, that the testator could only make this an effective codicil by making the will an effective will. If I am not to infer that in preparing this document, and having it executed in the form of a codicil, the testator intended to revive his will, what other intention can possibly be imputed to him? Nobody suggests that he was otherwise than in full possession of his faculties. It seems difficult to draw the inference that in executing this document he was intending to revoke the will. For the will was in any case already revoked by his marriage;

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and even if he were unaware of that (although, as I have pointed out, there is evidence to show that he had been reminded of it), there are easier ways than that to revoke a will which you wish to revoke.

I am baffled when I try to think what other intention the deceased could possibly have had except to revive the will. It appears to me that the words ought to be construed, if they legitimately and fairly can be construed, so as to have some effect. The only effect I can give them is the effect of making the will effective.

In all the circumstances, and bearing in mind, as I have done, the attendant circumstances that have been proved in evidence, I have come to the conclusion that the execution of that document in 1943, coupled with the words used therein, do show an intention to revive the will of 1931, which had been revoked by the marriage of 1932.

It appears to me, therefore, that the will and the codicil should be admitted to probate as valid testamentary documents.

Solicitors: *Collyer-Bristow & Co., for Ingram & Co., Leicester.*

J. B. G.

1952

June 25.

 Collingwood J.

WAIGHT v. WAIGHT AND WALKER.

Divorce—Costs—Execution—Interpleader proceedings—Jurisdiction—Appeal from registrar—To judge in chambers—Matrimonial Causes Rules, 1950 (1950 S.I. 1940 (L.27)), rr. 59, 80—R.S.C., Ord. 54, r. 22A.

An appeal in interpleader proceedings in a matrimonial cause lies to the judge in chambers and not to the Divisional Court.

Bernbaum v. Bernbaum [1949] P. 325 followed and applied.

SUMMONS (adjourned into court for judgment).

A co-respondent in a divorce suit (the judgment creditor) was dismissed from the suit with costs against the petitioner in October, 1951. In March, 1952, execution in respect of the order was levied upon a motor-car. That car was claimed by one Linda Moore, and the registrar allowed her claim on April 8, 1952, after hearing oral evidence.

The judgment creditor appealed from the registrar to the judge in chambers. The preliminary objection was taken on behalf of

the claimant that the appeal lay to the Divisional Court, and not to the judge in chambers. Reliance was placed on R.S.C., Ord. 54, r. 22A,¹ and rule 80² of the Matrimonial Causes Rules, 1950; and it was submitted that rule 59³ of the Matrimonial Causes Rules, 1950, did not apply because in interpleader proceedings the registrar was himself exercising the function of a judge.

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Richard Vick for the claimant.

Dobry for the judgment creditor.

Argument was heard in chambers, where reference was also made, in addition to the matters referred to in the judgment, to R.S.C., Ord. 57, rr. 8 and 11.

Cur. adv. vult.

COLLINGWOOD J., reading his judgment, said:—This is an appeal from the decision of Mr. Registrar Compton Miller dated April 8, 1952, in interpleader proceedings, whereby he allowed the claim of the claimant and held that she had established her claim to a Vauxhall motor-car which had been seized in execution under a writ of fi. fa. in this suit.

Counsel for the claimant took the preliminary objection that the appeal lies to the Divisional Court, and not to the judge in chambers, and that I have no jurisdiction to hear it.

I was referred to R.S.C., Ord. 54, r. 22A. [His Lordship read the rule and continued:] It was contended that this rule was applicable to the Probate, Divorce and Admiralty Division by virtue of the Matrimonial Causes Rules, 1950, r. 80. [His Lordship read this rule and rule 59 and continued:] It was also contended that rule 59 did not apply to the registrar's order in

¹ R.S.C., Ord. 54, r. 22A (1): "There shall be a right of appeal from any finding decision order or judgment arrived at made given directed or entered by any master of the Queen's Bench Division on the hearing or determination by him of . . . (b) any interpleader or garnishee matter or issue whether by way of summary decision or adjournment of the interpleader or garnishee summons or order nisi or on an issue directed or otherwise and whether by consent or otherwise."

(2) "Such appeal shall be to a Divisional Court by notice of motion . . ."

² Matrimonial Causes Rules, 1950, r. 80: "Subject to the provisions of these rules and of any enactment, the Rules of the Supreme Court shall, notwithstanding the provisions of Order 68 thereof, apply with the necessary modifications to the practice and procedure in any cause or matter to which these rules apply."

³ Matrimonial Causes Rules, 1950, r. 59: "A party may appeal from an order or decision of a registrar to a judge in chambers by summons to be issued within seven days. . . ."

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the present case, but was confined to what counsel described as "ordinary summonses," whereas in interpleader proceedings the registrar was himself exercising the functions of a judge. It was submitted that, there being no special rule dealing with such a case in the Matrimonial Causes Rules, the effect of rule 80 was to apply the provisions of R.S.C., Ord. 54, r. 22A.

A similar submission was made to Barnard J. in *Bernbaum v. Bernbaum*⁴ in respect of an appeal from an order of a registrar on an application under section 17 of the Married Women's Property Act, 1882. It was rejected by Barnard J., who said⁵: "The registrar although armed with the jurisdiction and powers of a judge under this section, still remains a registrar, and therefore I think an appeal from him is governed by rule 59 and lies to a judge in chambers." This decision was upheld by the Court of Appeal.⁶ It is to be observed that the application of the Rules of the Supreme Court under rule 80 of the Matrimonial Causes Rules, 1950, is "subject to the provisions of the Matrimonial Causes Rules." In my opinion, rule 59 of the Matrimonial Causes Rules, 1950, applies in the present case, and I hold that the appeal lies to the judge in chambers and that I have jurisdiction to hear it.

The appellant is out of time, and the judgment creditor asks for leave to appeal. The registrar refused leave at the hearing and thereupon a notice of appeal to the Divisional Court was prepared, the legal advisers [of the judgment creditor] then taking the view that appeal lay to that court. Owing to delay in the solicitor's office it was not until May 16, 1952, that the application was made to the Divisional Court for leave to appeal out of time. On that application no order was made except that the costs of the day be costs in any motion brought by way of appeal against the registrar's order within 28 days, otherwise claimant's costs of the day, and if the matter not pursued there (that is, in the Divisional Court), the judgment creditor to pay the costs. In view of the circumstances in which the delay occurred I do not think that the judgment creditor should be debarred from appealing, and I accordingly give the necessary leave.

[His Lordship then considered the appeal on its merits, and dismissed it.]

Solicitors: *Markham Thorp & Co.; Bateman & Co.*

J. B. G.

⁴ (1948) 65 T.L.R. 62; [1948] W.N. 463.

⁵ 65 T.L.R. 62, 63.

⁶ [1949] P. 325.

HADKINSON v. HADKINSON.

C. A.

Divorce—Custody—Appeal—Contempt of court—Petitioning mother given custody of child of marriage—Child not to be taken out of jurisdiction—Remarriage of mother—Child taken out to Australia—Court order to return child within jurisdiction—Mother in contempt—No appeal entertained until child returned to jurisdiction.

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July 11, 25.

Somervell,
Denning and
Romer L.JJ.

A wife who had successfully petitioned for divorce, was given the custody of the only child of the marriage, a boy, until further order of the court, but was directed that he should not be removed out of the jurisdiction of the court without its sanction. Having remarried after the decree absolute she later caused the child to be removed to Australia, where she was living with her present husband. On a summons issued by the father of the child Wallington J. on May 29, 1952, ordered the mother to return the child within the jurisdiction not later than August 31, 1952. On an appeal by the mother against that order, counsel for the father took the preliminary objection that the appeal should not be heard because the mother had been at all times, and still was, in contempt:—

Held (per Somervell and Romer, L.JJ.), that it was the unqualified obligation of every person against, or in respect of whom, an order had been made by a court of competent jurisdiction, to obey it unless and until that order was discharged; that the mother in the present case had not brought herself within any of the exceptions to the general rule which debarred a person in contempt from being heard by the courts whose order he had disobeyed; and that she being in continuing contempt by retaining the infant out of the jurisdiction her appeal could not be heard until she had taken the first and essential step towards purging her contempt by returning the child within the jurisdiction.

Judgments of Lord Cottenham L.C. in *Chuck v. Cremer* (1846) Cooper temp. Cottenham 338, and of Vaughan Williams L.J. in *Gordon v. Gordon* [1904] P. 163, 171 applied.

Per Denning L.J.: The fact that a party to a cause had disobeyed an order of the court was not of itself a bar to his being heard, but if his disobedience was such that, so long as it continued, it impeded the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it might make, then the court might in its discretion refuse to hear him until the impediment was removed. The present case was a good example of a case where the disobedience of the party impeded the course of justice.

Observations of Sir George Jessel M.R. in *In re Clements v. Erlanger* (1877) 46 L.J.Ch. at p. 382 followed and applied.

APPEAL from Wallington J.

On December 21, 1950, a decree nisi was granted to the petitioner, Mrs. Hadkinson, against her husband, and it was

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ordered that the child of the marriage, a boy now aged about 13 years, should remain in her custody until further order of the court. It was also directed that he should not be removed out of the jurisdiction of the court without its sanction. Previously to the making of the order an arrangement had, it was stated, been made that the father should have reasonable access to the child, and that the child's school holidays should be shared between the parents. On February 3, 1951, the decree nisi was made absolute, and towards the end of the following April the mother remarried. Her present husband lived in Australia, and she joined him there in the following autumn, leaving the child at school in this country. In December, 1951, without informing the father or his solicitors of her intention, and without applying to the court for its sanction, she caused the child to be removed from England to Australia. Her original intention was said to be to return him to this country at the end of his Christmas holidays, but in fact he had remained in Australia and had been sent to a school there.

On February 26, 1952, a summons, issued by the father, came before Wallington J., who made an order directing the mother to return the boy within the jurisdiction of the court, and to the care of a named gentleman, not later than August 31, 1952.

The mother now seeking to appeal against that order, a preliminary objection was raised on behalf of the father.

R. F. Levy Q.C. and *Roger Ormrod* for the father. This lady is in contempt of the original order which prohibited her from taking the child out of the jurisdiction without the sanction of the court, and while she remains in contempt she is not entitled to pursue this appeal. The order of Wallington J. requires her to bring the child back to the jurisdiction in order to purge her contempt. She has not done so and is therefore continuing in contempt. Until she puts herself in a position in which the original order may be varied, the court will not entertain her appeal. That rule was recognized and applied in *Garstin v. Garstin*¹ and *Gordon v. Gordon*.² The rule that a person who is in contempt cannot be heard is not restricted to voluntary applications for an indulgence. In *Gordon v. Gordon*² Vaughan Williams L.J. said³: "If an order has been made in the exercise "of the discretion of the court, and someone who is oppressed, "or thinks himself oppressed, by that order, appeals, saying that

¹ (1865) 4 Sw. & Tr. 73.

³ Ibid. 171.

² [1904] P. 163.

"the court has exercised its discretion wrongly, that person, if he is in contempt, cannot be heard to say anything of the kind until he has purged his contempt." Here the wife, by her affidavit, while admitting that she is in contempt and that she does not propose to purge it, nevertheless asks the court to set aside the order of Wallington J. Where the contempt is continuing an apology is not a purging of the contempt. The only way in which this lady can purge her contempt is by bringing the child back to the jurisdiction.

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Beyfus Q.C. and *Leslie Brooks* for the mother. The mother is entitled to be heard so that the court may consider the merits of the appeal. It is doubtful whether she is in continuing contempt, because the order of Wallington J. is to return the child by August 31, 1952, and if the appeal be heard and dismissed on its merits there is no reason to doubt that the child will be brought back before that date. It must be admitted that the mother is technically in contempt, however little she may have known of the legal position, but the case sought to be made in her behalf is that she is not asking for an indulgence but seeking to defend herself and to protect the interests of the child. The whole tenor of the authorities, such as *Chuck v. Cremer*,⁴ is that although a person in contempt cannot come to the court and ask for an indulgence, he can come to protect himself if he considers himself oppressed by an order wrongly made.

SOMERVELL L.J. We are of opinion that the preliminary point succeeds, and we will put our reasons into writing.

July 25. The following judgments were read:—

SOMERVELL L.J. I will ask Romer L.J. to deliver the first judgment, to which I have nothing to add.

ROMER L.J. This is an appeal by a wife who has now remarried, arising out of a divorce suit which she brought successfully against her former husband, against an order made by Wallington J. on May 29, 1952, ordering her to bring the child of the marriage within the jurisdiction of the court. On the appeal being opened, and before the merits of the matter were argued, Mr. Levy, on behalf of the father, the respondent to the appeal, took the preliminary objection that the appellant petitioner was not entitled to be heard by the court on the ground

⁴ (1846) Cooper temp. Cott. 205.

C. A. that she has been at all material times, and still is, in contempt.
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that in our opinion it should prevail, but that we would express
in writing the reasons upon which we based our conclusion.

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[His Lordship stated the facts and continued:] Apart from the sudden and complete disruption of the child's life which the mother's action, in removing him to, and keeping him in, Australia entailed, two comments upon her conduct are obvious. First, her action was in direct violation of the order of December 21, 1950, and constituted, *prima facie*, a gross contempt of court; and, secondly, it nullified the arrangements to which she had agreed for access by the father. This second consideration need not, at present, be explored further, beyond noting that the mother must have been fully aware that this consequence would ensue even if, as she says in her affidavit, she was unaware that she was disobeying the order of the court. It is this disobedience which is the matter now in issue before us and with which I now propose to deal.

It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. "A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it. . . . It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and void—whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question: that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed." (*Per Lord Cottenham L.C. in Chuck v. Cremer*.⁵)

Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by

⁵ Cooper temp. Cott. 205, 338.

such a person will be entertained until he has purged himself of his contempt. It is the second of these consequences which is of immediate relevance to this appeal. The rule, in its general form, cannot be open to question. There are many reported cases in which the rule has been recognized and applied, and I need refer only to *Garstin v. Garstin* ⁶ and *Gordon v. Gordon*.⁷

No attempt, indeed, was made before us by Mr. Beyfus, on behalf of the mother, to challenge the rule itself; he sought only to bring the present case within one of the exceptions to which the rule is undoubtedly subject. Before explaining why, in my opinion, Mr. Beyfus has failed in this attempt, I will deal briefly with the first submission which he made and which was to the effect that the wife is not in contempt at all. This contention was based solely on the fact that, in the order under review, the mother was not directed to bring the child back within the jurisdiction forthwith, but not later than August 31 next. This was relied on by Mr. Beyfus as impliedly authorizing the retention of the child outside the jurisdiction until that date. I am quite unable to accept that as a legitimate or reasonable inference from the order. It would have been clearly wrong to have insisted upon the immediate return of the child without any regard to matters affecting the boy himself, e.g., his current and future educational and holiday arrangements. I have no doubt that it was considerations of this kind that led the learned judge to fix a future date for the child's return to this country, and that he was in no way intending to exonerate the mother from her contempt.

Is this case, then, an exception from the general rule which would debar the mother, as a person in contempt, from being heard by the courts whose order she has disobeyed? One of such exceptions is that a person can apply for the purpose of purging his contempt and another is that he can appeal with a view to setting aside the order upon which his alleged contempt is founded; neither of those exceptions is relevant to the present case. A person against whom contempt is alleged will also, of course, be heard in support of a submission that, having regard to the true meaning and intendment of the order which he is said to have disobeyed, his actions did not constitute a breach of it; or that, having regard to all the circumstances, he ought not to be treated as being in contempt. The only other exception which could in any way be regarded as material is the qualified exception which, in some cases, entitles a person who is in

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⁶ 4 Sw. & Tr. 73.⁷ [1904] P. 163.

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contempt to defend himself when some application is made against him (see, e.g., *Parry v. Perryman* (M.R., July, 1938), referred to in the notes to *Chuck v. Cremer*⁸). The nature and limits of this exception were explained by this court in *Gordon v. Gordon*.⁹ In that case an order was made in divorce proceedings against a wife, at the instance of her husband, to hand over to him the child of the marriage and she was ordered to pay the costs of the application out of her separate property notwithstanding that such property was subject to a restraint upon anticipation. On the husband attempting to serve the order it was found that the wife had gone away with the child in spite of an undertaking which she had given not to do so. Thereupon a further order was made for the attachment of the wife for contempt and another order for her committal. These orders could not be put into effect, however, because the wife was abroad. She subsequently, whilst still in contempt, appealed against so much of the order first above mentioned as directed her to pay costs out of property of hers which was subject to a restraint upon anticipation.

The court entertained her appeal on grounds which Vaughan Williams L.J. expressed as follows¹⁰: "Taking it generally," he said, "it has not been disputed in the discussion before us that "this rule, that a person who is in contempt cannot be heard, "prima facie applies to voluntary applications on his part—when "he comes and asks for something; and not to cases in which "all that he is seeking is to be heard in respect of matters of "defence. I do not for one moment suggest that every matter "of defence entitles a person in contempt to be heard; for "instance, if an order has been made in the exercise of the "discretion of the court, and some one who is oppressed, or "thinks himself oppressed, by that order, appeals, saying that "the court has exercised its discretion wrongly, that person if "he is in contempt cannot be heard to say anything of the kind "until he has purged his contempt." Cozens-Hardy L.J., in concurring, limited his judgment to a case in which the party in contempt "is saying that the order complained of is outside "the jurisdiction of the court as distinguished from the case of "an order which, although it is within the jurisdiction of the "court, ought not, it is said, to have been made."

Having regard to the nature of this exception to the general rule it was sought before us to bring the mother in the present case

⁸ Cooper temp. Cott. 205.¹⁰ Ibid. 171.⁹ [1904] P. 163.

within it. It was represented that the summons which came before Wallington J. was one in which the father was asking that an order should be made against her; that accordingly, and notwithstanding her contempt, she was entitled to appear in order to resist the application; and that she is equally entitled to appear before this court and appeal against the order which the learned judge thought proper to make. In my judgment, this suggestion is untenable and fallacious. Assuming for the moment that all that the appellant is seeking to do before us is to adopt a defensive role, she is in fact appealing against an order which was made against her in the exercise of the discretion of the court and is thus within the exception to the exception (if one may so describe it) which Vaughan Williams L.J. envisaged in *Gordon v. Gordon*.¹¹

Apart altogether from that, however, she is not, in my judgment, within the exception at all; and this for two reasons. First, the father was not, by his summons, asking the court to grant relief against the mother of a description which had not been granted before; all that he was asking for was a supplementary order for enforcing an order that had already been made. Secondly, the mother was not merely resisting the making of this supplementary order but was in effect seeking to utilize the father's application for the purpose of discharging or varying the previous order—an order against which she had not appealed and indeed could not have appealed, for she had obtained it herself. This attitude on the part of the mother sufficiently appears from paragraph 10 of the affidavit which she swore in opposition to the summons and which is in the following terms: "I ask this "Honourable Court to allow me to purge my contempt by this "humble apology and believe that what I did was in ignorance "and that I may be allowed to keep my son in Australia notwithstanding my contempt, as it is in the best interests of the child "that he should be with me and enjoy a home and good education "and the love and affection of one of his parents. My present "husband has a real affection for my son which my son has in "return for him."

I would add in passing that an apology is no acceptable substitute for compliance with an order and will not in any circumstances be regarded in itself as a purging of contempt. Nor has the mother in any way, as I think, by virtue of any exception to the general rule, or otherwise, shown that

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¹¹ [1904] P. 163.

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notwithstanding her continuing contempt of court she should be allowed to be heard in support of this appeal; and by parity of reasoning she should not, in my opinion, have been heard in opposition to the father's application in the court below.

It appears to me that this is the very kind of case in which the ordinary rule should be applied in all its strictness. Disregard of an order of the court is a matter of sufficient gravity, whatever the order may be. Where, however, the order relates to a child the court is (or should be) adamant upon its due observance (*cf.* the recent case of *Corcoran v. Corcoran*¹²). Such an order is made in the interests of the welfare of the child and the court will not tolerate any interference with or disregard of its decisions upon these matters. Least of all will the court permit disobedience of an order that a child shall not be removed outside its jurisdiction. The reason for this is obvious. The court cannot exercise its quasi-parental powers in relation to a child unless effect can be given to its orders, and it cannot enforce its orders if the child is taken abroad. Once a child is removed from the jurisdiction no satisfactory means have ever been devised of ensuring or enforcing its return. It is because of this that applications for leave to take an infant, even temporarily, out of the country are jealously scrutinized and are only granted subject to every guarantee that is reasonably possible being exacted for the return of the child at the end of the authorized period. There is always the danger that a parent will be able, by wrongfully taking a child abroad, or by keeping him there after the sanctioned period has expired, to present the court with a *fait accompli* and to argue that, the child having become firmly established outside the jurisdiction, it would be against his interests to bring him back within it; indeed, an argument to this effect was foreshadowed during the discussion before us on the present appeal.

It follows from what I have said that the mother's conduct in removing her son to Australia, without the permission of the court and against its express order, constituted, in my view, a contempt of the grossest kind. She says in her affidavit, to which I have already referred, that she did not know that the decree *nisi* prohibited her from taking the child out of the jurisdiction. In the absence of cross-examination, or of evidence to the contrary, this statement cannot be rejected, although I confess that I accept it with some reserve—for she plainly knew that the order gave her the custody of the child. But Mr. Beyfus admitted

¹² [1950] 1 All E.R. 495.

that she knew of this prohibition last January or February at the latest and he was constrained to concede that she has taken no step whatever since then towards putting the matter right. Further, her affidavit contained no offer to bring the child back to England, or any undertaking so to do in the event of the father's application being successful. This omission, coupled with her previous conduct, not unnaturally aroused a suspicion (possibly without foundation) that in her own contemplation she had something to gain and nothing to lose whatever the result of the appeal—on the ground that if she won it nothing further would be heard of her contempt, whilst if she lost it she would flout the order in the same way that, for at least the last six months, she has flouted its predecessor.

For the reasons which I have endeavoured to explain, I am clearly of the opinion that the mother was not entitled, in view of her continuing contempt of court, to prosecute the present appeal and that she will not be entitled to be heard in support of it until she has taken the first and essential step towards purging her contempt of returning the child within the jurisdiction. I would like, however, in conclusion, to say a word or two with regard to an argument which was addressed to us by Mr. Beyfus to the effect that, apart altogether from the considerations with which I have already dealt, this court ought to entertain the appeal on its merits. The order which he is seeking to challenge is, he said, one that affects the welfare of a child; the court cannot deal with such a matter without having before it the views of the child's mother, more especially when the mother has been granted its custody; and that the court cannot discharge its duty to the child if the mother is precluded from audience.

There would, I think, have been some force in this contention if the mother had desired to inform the court that, for reasons of health or otherwise, it was dangerous, impossible, or even impracticable, to bring the infant immediately from Australia to this country. The court would undoubtedly grant audience to anyone who desired to bring matters of this kind to its attention—even a person who was in contempt; for a refusal so to do might result in irreparable injury to the infant. Nothing of this kind, however, was or could be suggested in the present case. We were informed that the mother herself has means and is married to a man of wealth. No difficulty of any other kind was even hinted at in the way of the child's return; indeed, after we had announced our decision to allow the preliminary objection we were told by

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Mr. Beyfus that the boy would probably be returned to England within a fortnight or so. Although, therefore, there are circumstances in which the court would hear a parent who was in contempt (and I do not suggest that the examples which I have given are exhaustive), no such circumstances exist in the present case. Undoubtedly the mother should be heard before a final decision is reached on a matter so vital to the infant as his future domicile. Let her be heard, however, when the boy's return within the jurisdiction will have produced the dual effect of partially purging the mother's contempt and of enabling the court to enforce such order with regard to the child as it may then think proper to make.

I understand that, in fact, the child has already been, or that it will have been by Monday, returned within the jurisdiction, and, if so, the mother will then be able to have this appeal heard and determined on its merits. In these circumstances it will not, perhaps, be necessary to make a formal order now on the preliminary objection, but such an order, if made, would have been to the following effect:—

“It appearing that the appellant is in continuing contempt of court by retaining the infant outside the jurisdiction of the court, Let the appeal stand over generally with liberty to the appellant to apply to restore after the infant has been returned within the jurisdiction.”

DENNING L.J. This appeal concerns a boy, aged 13, whose father and mother are divorced. When the decree of divorce was pronounced the mother was given the custody of the boy, but it was directed that he should not be taken out of the jurisdiction of the court without its sanction. In breach of that order the mother took him to Australia without the sanction of the court, and wants him to stay with her there. The father wants him returned to England. Wallington J. ordered the mother to bring him back to England. The mother now appeals to this court; but when the appeal was called on, counsel for the father objected to our hearing counsel for the mother at all. It was said that the mother was in contempt because she had taken the child out of the jurisdiction of the court without its sanction, and that it was a settled rule that a party in contempt could not be heard until he cleared his contempt. After hearing argument we upheld this objection and refused to hear counsel for the mother on the merits of her appeal, but said that we would give our reasons later. The time has now come to give our reasons.

I need hardly say that it is very rare for this court to refuse to hear counsel for an appellant. No matter how badly a litigant has behaved, nevertheless, generally speaking, if he has a right of appeal, he has a right to be heard; for the simple reason that, if he is not heard, his right of appeal is valueless. The present case is, I believe, the first occasion on which this court, since it was set up 80 years ago, has refused to hear an appellant who has been heard by the court below. Our course requires, therefore, to be justified.

The rule which we are asked to invoke—that a party in contempt will not be heard—was never a rule of the common law. It was a rule of the canon law, which was adopted by the ecclesiastical courts and the Chancery court. Those courts exercised jurisdiction in personam, not in rem. They had no writs of fieri facias or elegit by which they could forcibly execute their orders, and so they adopted this rule as a means of getting the parties to obey the orders of the court. If an order of the Chancery court or the ecclesiastical court was disobeyed, the party was held to be in contempt. This disobedience was not a criminal misdemeanor, but only what is called in the books a contempt in procedure. The common law courts had for centuries punished criminal contempts, such as interference with the judges or the course of justice, but they did not punish contempts in procedure of other courts. It was left to the ecclesiastical courts and the Chancery court to enforce their own orders in their own way. The Chancery court used to issue writs of attachment or orders for committal, to imprison the parties who disobeyed its orders. The ecclesiastical court used to excommunicate its recalcitrants. But each of those courts also adopted the rule of the canon law that they would not hear a party who had disobeyed its orders. The question in this case is: how far does that rule apply today?

The history of the rule in Chancery can be traced with some accuracy. It originated in an ordinance of Lord Bacon of 1618, which laid down that “they that are in contempt are not to be heard neither in that suit, nor in any other, except the court “of special grace suspend the contempt.” This ordinance was much used as a means of enforcing orders in Chancery, but it was never applied unless and until the contempt had been established by the issue of a writ of attachment or an order for committal. As soon as that was done the party became a party in contempt and the court would not hear him: see *Wilson v. Bates*,¹³ per

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¹³ (1838) 3 M. & C. 197, 202.

C. A. Lord Cottenham L.C.; Daniell's Chancery Practice, 6th ed. (1882), p. 906, n. (e); Oswald on Contempt, 1st ed. (1892), p. 150, 3rd ed., p. 246; Halsbury, Laws of England, 2nd ed., vol. 7, p. 4. Before the Judicature Acts the rule was much used in Chancery, especially in cases where a party had not obeyed an interlocutory order, such as an order to pay costs or to put in an answer. In those days an attachment was issued ex parte by the clerks in the office without the defaulter being heard, with the result that he could not be heard in any subsequent proceedings in the suit until he had paid the costs, or put in an answer, as the case might be, and also paid the costs of the attachment. This was a very effective weapon to secure his compliance. It is well described by Gilbert C.B. in his book on Chancery Practice (*Forum Romanum*) written about 1712, at pp. 102, 216. Later developments will be found set out in *Broomhead v. Smith*.¹⁴

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The ordinance of Lord Bacon was, however, capable of working great injustice, and in the course of practice it came to be much restricted in scope. It was confined to cases where a party in contempt, that is, a party against whom a writ of attachment had issued or an order for committal had been made, came forward voluntarily and asked for an indulgence in the self-same suit. It was no indulgence for a plaintiff to bring his cause to a hearing or for a defendant to defend himself. Even if he was in contempt, therefore, he was allowed to be heard, unless an order had been made staying the proceedings: see *Ricketts v. Mornington*¹⁵ and *Wilson v. Bates*.¹⁶ The rule, as so confined to indulgences, continued to be applied in the Chancery court so long as attachment could be issued as of right ex parte without the leave of the court (see *Chuck v. Cremer*¹⁷); but the rule has seldom been applied since that right was abolished. The Debtors Act, 1869, abolished, for the most part, attachment for non-payment of money or costs, and the Judicature Acts and rules thereunder abolished the issue of attachment without leave. Since that time a party does not lose his right to be heard simply by default of pleading or default in payment of costs, nor automatically by disobedience to other interlocutory orders. Other consequences may follow from his default, e.g., proceedings may in the discretion of the court be stayed until he complies with the order, but unless there is a stay he is not automatically shut out from being heard. It is a matter

¹⁴ (1802) 8 Ves. 357.

¹⁵ (1834) 7 Sim. 200.

¹⁶ 3 M. & C. 197.

¹⁷ Cooper, temp. Cott. 205.

for the discretion of the court dependent on the circumstances of the case: see *In re Wickham*.¹⁸

The history of the rule in the ecclesiastical courts is not so easily traced, because their decisions did not form binding precedents and were not reported until much later than the decisions in Chancery. One thing is certain, however, and that is that the rule was not tied to the issue of an attachment or committal, for the simple reason that the ecclesiastical courts did not issue attachments or committals. The rule that the ecclesiastical courts applied was that, if a party was in contempt for disobeying an order, and his disobedience impeded the course of justice in the suit, the court might in its discretion refuse to allow him to take active proceedings in the suit until the impediment was removed. Thus where a wife, who was charged with adultery, failed to comply with a decree for confrontation (which was a process for establishing her identity), she thereupon became in contempt and the court refused to let her put in a defensive allegation, such as connivance: see *Curtis v. Curtis*.¹⁹

When the Divorce courts were set up in 1857 they were given power to issue attachments and committals like the Chancery court, but they inherited the same rules of procedure as the ecclesiastical courts. In particular they adopted the rule of the ecclesiastical courts about not hearing a party in contempt. Thus, where a wife had taken a child abroad in contravention of an order of the court, she was held to be in contempt, and the court refused to hear her counsel until the contempt was cleared. In one case of this kind an attachment had been issued, *Garstin v. Garstin*,²⁰ and in another it had not (see *Cavendish v. Cavendish and Rochefoucauld* ²¹); but in each case the court applied the rule. So also when a husband refused to comply with an order to provide security for his wife's costs, though he could quite well do so, he was not allowed to make an application in the cause until the costs were paid. Hill J. said it was a matter for the discretion of the court, in all the circumstances of the case, whether to hear him or not: *Leavis v. Leavis*.²² The case of *Gordon v. Gordon* ²³ is an illustration of circumstances where the court heard a party despite his contempt. Since the Judicature Acts the same rule has been applied to the Bankruptcy courts. Thus, when a bankrupt had disobeyed an order to make a

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¹⁸ (1887) 35 Ch.D. 272.¹⁹ (1846) 5 Moo.P.C. 252.²⁰ 4 Sw. & Tr. 73.²¹ (1866) 15 W.R. 182.²² [1921] P. 299.²³ [1904] P. 163.

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statement of his affairs and had deliberately kept out of the way of the court and of his creditors, he was held to be in contempt and the Bankruptcy court refused to hear his counsel on an inquiry as to damages for breach of contract, even though no attachment had been issued against him, and this court upheld the ruling: see *In re Langworthy*.²⁴

Those cases seem to me to point the way to the modern rule. It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance. In this regard I would like to refer to what Sir George Jessel M.R. said in a similar connexion in *In re Clements v. Erlanger*²⁵: "I have myself had "on many occasions to consider this jurisdiction, and I have "always thought that, necessary though it be, it is necessary "only in the sense in which extreme measures are sometimes "necessary to preserve men's rights, that is, if no other pertinent "remedy can be found. Probably that will be discovered after "consideration to be the true measure of the exercise of the jurisdiction." Applying this principle I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.

The present case is a good example of a case where the disobedience of the party impedes the course of justice. So long as this boy remains in Australia it is impossible for this court to enforce its orders in respect of him. No good reason is shown why he should not be returned to this country so as to be within the jurisdiction of this court. He should be returned before counsel is heard on the merits of this case, so that, whatever order is made, this court will be able to enforce it. I am prepared to accept the view that in the first instance the mother acted in ignorance of the order, but nevertheless, once she came to know of it, she ought to have put the matter right by bringing the boy back. Until the boy is returned we must decline to hear her appeal.

²⁴ (1887) 3 T.L.R. 826.

²⁵ (1877) 46 L.J.Ch. 375, 383.

[On July 29, the boy having been returned to the jurisdiction, the court heard the appeal in camera, and allowed it.]

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Solicitors: *Carters; W. F. Prior & Co.*

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1952
June 10.

Husband and Wife—Jurisdiction—Wilful neglect to maintain—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 23.

Willmer J.

Jurisdiction to entertain proceedings depends upon the domicile and residence of the parties: it is quite separate from the merits of the claims put forward.

Where, therefore, objection was taken to the jurisdiction of the court, in proceedings under section 23 of the Matrimonial Causes Act, 1950, by a wife who alleged that she had been deserted by her husband within three years of her application, and who was domiciled in England:—

Held, that although she would necessarily have failed had she instituted proceedings for judicial separation, the court had the necessary jurisdiction to entertain her application for periodical payments.

Observations in *Rusby v. Rusby* [1950] W.N. 349 followed.

OBJECTION to jurisdiction.

A wife applied for periodical payments under section 23 of the Matrimonial Causes Act, 1950,¹ and alleged that she had been deserted by her husband within three years of her application. The preliminary point was taken against her application that the court had no jurisdiction.

James Comyn for the husband. The section uses the phrase “jurisdiction to entertain proceedings by a wife for judicial “separation.” “Jurisdiction” has a special meaning to cover all aspects of the ability of the court to adjudicate; it is not confined to questions of domicile or residence. Were that the only test, the statute would have said so. In this case the desertion

¹ Matrimonial Causes Act, 1950, s. 23 (1): “Where a husband has “been guilty of wilful neglect to provide reasonable maintenance for his “wife or the infant children of the “marriage, the court, if it would have

“jurisdiction to entertain proceedings “by the wife for judicial separation, “may, on the application of the wife, “order the husband to make to her “such periodical payments as may be “just; . . .”

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was of too short duration for a decree; and if what is alleged is something for which the court has no power to grant such relief, it can have no jurisdiction.

The contention that the section envisages the allegation of a matrimonial offence for which a judicial separation would be granted is supported by the relevant sub-rule² which applies provisions of the Matrimonial Causes Rules, 1950, to an application "as if the originating summons were a petition and the applicant "were the petitioner."

In *Rusby v. Rusby*³ the point was not contested, and it is respectfully submitted that the observations were obiter and may be disregarded. Section 23 does not enlarge a wife's rights; it is confined to giving her an alternative remedy in lieu of a decree.

Joseph Jackson (*Victor Williams* with him) for the wife.

WILLMER J. I have had a most interesting and ingenious argument from Mr. Comyn in this case. He has taken a preliminary objection to the jurisdiction of the court. He informs me—although I have not so far seen the affidavits that have been filed—that the affidavit put in by the wife discloses that her husband has deserted her, but for a period of less than three years. It is in those circumstances that Mr. Comyn contends that the court has no jurisdiction to entertain proceedings under section 23 of the Matrimonial Causes Act, 1950. [His Lordship read the section and continued:] What is said by Mr. Comyn is that in this case it appears on the face of the wife's affidavit that the court would not have jurisdiction to entertain proceedings by the wife for judicial separation based on desertion because the necessary three years have not yet elapsed. It is contended that in those circumstances the court has no jurisdiction to entertain proceedings under the section.

In my judgment, the argument, attractive as it is, is entirely fallacious because it confuses the question whether there is jurisdiction to entertain proceedings with the question whether there are in fact good grounds for proceedings. Merely because the wife would necessarily have failed in a particular case had she instituted proceedings for judicial separation, it does not in the least follow that the court would have no jurisdiction to entertain such proceedings.

² Matrimonial Causes Rules, 1950, r. 56 (16): "The provisions of rules 9, "10, 11, 12, 13, 14, 23, 32, 35, 36, 69 "and 70 shall apply to an applica- "tion under this rule as if it were a

"matrimonial cause and as if the "originating summons were a petition "and the applicant were the peti- "tioner."

³ [1950] W.N. 349.

The jurisdiction to entertain proceedings depends on the domicile and residence of the parties. That is quite a separate matter from the merits of the claim put forward. It seems to me that any other view would involve that this new section of the Act added nothing to the remedies already open to the wife. Yet, quite clearly, I should have thought, section 23 was intended to confer a new remedy.

That is the view of the matter at which, without assistance, I should myself have arrived. But I am very happy to be able to say that it is entirely in accordance with the view expressed by the President in *Rusby v. Rusby*.⁴ That was, I believe, the very first application of this nature to come before the court. The President then took the opportunity of making certain remarks as to the scope of the new remedy which had been made available to wives by the new section. What he said, of course, was obiter, and it was also said without the President having had the benefit of argument before him. On the other hand, that pronouncement, coming from such a source, is one to which I should in any case feel bound to pay a great deal of respect. He said: "Before
" the court entertains an application of this sort, it is first of all
" necessary for it to satisfy itself that it would have jurisdiction to
" entertain proceedings by the wife for judicial separation. Mr.
" Sutcliffe has rightly refrained, in my opinion, from suggesting
" that that means that one has to inquire whether the circum-
" stances are such that a decree of judicial separation should be
" pronounced. What is meant is that the status of the parties
" as regards domicile, residence or the like is such that the court
" would have jurisdiction as between those parties to pronounce
" a decree of judicial separation. If that condition is satisfied,
" then it has jurisdiction to entertain an application of this kind."

Mr. Comyn concedes that, if what the President there says is right, it is completely destructive of the objection which he has taken to the jurisdiction in this case, and he has not hesitated to attack the view there expressed by the President, pointing out, quite properly, that it was a view arrived at without argument and expressed quite obiter.

I find myself so completely in agreement with what the President said in that case that I do not wish to spend any further time in finding new language in which to express the same idea. I would like to adopt every word of what the President said in

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⁴ [1950] W.N. 349. The relevant section, reproduced in s. 23, was then s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949.

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that case, and, basing myself on that, it appears to me that there is no merit in the objection to the jurisdiction which has been taken in this case.

[The application for periodical payments was then heard and dismissed on the facts.]

Solicitors: *Hancock & Willis; Ford, Michelmores, Rose & Binning.*

J. B. G.

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July 21, 22,
23, 30.

STARKOWSKI (OTHERWISE URBANSKI, OTHERWISE JUSZCZ-KIEWICZ) BY HIS NEXT FRIEND v. ATTORNEY-GENERAL (STARKOWSKI AND OTHERS CITED).

Somervell,
 Denning and
 Romer L.JJ.

International Law—Marriage—Validity—Retroactive foreign law—Change of domicile meanwhile—Legitimacy—Austrian religious ceremony validated by subsequent registration—Petitioner's mother married to a man not petitioner's father at Austrian ceremony—Petitioner's birth prior to marriage registration in Austria—Petitioner's parents parties to British marriage ceremony after registration of Austrian marriage ceremony—British marriage invalid.

The parents of the petitioner, who was born in England in March, 1949, went through a ceremony of marriage in England in February, 1950. The petitioner's mother had, however, gone through a previous ceremony of marriage in a Roman Catholic church in Austria in May, 1945, with one of the parties cited. At that time Austrian law only recognized as valid marriages celebrated at civil registries in accordance with the German Marriage Law of 1938; but by a special law, which came into force on June 30, 1945, after the liberation of Austria, provision was made for the validation of other ceremonies by registration. The ceremony of May, 1945, was registered by the authorities (though without the express consent of the parties) in July, 1949. The question accordingly arose whether the British ceremony of February, 1950, was a valid marriage and legitimated the petitioner, who was born illegitimate, domiciled in England, and with a potentiality of being legitimated.

Barnard J. held that the British marriage was invalid and the petitioner therefore illegitimate. On appeal:—

Held, (1) that the law of the country where a marriage has been solemnized must decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted.

Per Cotton L.J. in *Sottomayor v. De Barros* (1877) 3 P.D. 1, 5.

(2) Legislative Acts, such as the special law of 1945, are passed to remedy what has been done in good faith but has failed to

achieve the result which the parties had expected, and the effectiveness of Austrian laws, validating a ceremony performed in that country, must be recognized by British law, and the status of the parties is not affected by a subsequent acquisition of domicile in England. The British marriage was therefore invalid and the petitioner was illegitimate.

Decision of Barnard J. ante, 135, affirmed.

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APPEAL from Barnard J.¹

Legitimacy suit.

The petitioner's mother, Henryka Antonia Starkowski (otherwise Urbanski, otherwise Juszczykiewicz), went through a ceremony of marriage with Ryszard Urbanski at the Roman Catholic church at Kitzbühl, Austria, on May 19, 1945. They were both Poles, born in Cracow, a bachelor and a spinster, domiciled in Poland at the date of the ceremony. A child, Barbara Janina, was born of that union on June 12, 1945. In the following month they left Austria, and eventually reached England, where they lived together until 1947. The petitioner was born in England on March 27, 1949, his father being Mieczyslaw Starkowski, and his parents went through a ceremony of marriage at a Croydon registry office on February 11, 1950.

At the time of the ceremony at Kitzbühl the German marriage law of July, 1938, was still in force in Austria, and by that law a valid marriage could only be concluded before the civil authorities. Therefore the marriage on May 19, 1945, was not valid. On April 27, 1945, Austria was liberated, and on May 1, 1945, the Provisional Government published an order repealing some of the German laws then in force, but confirming for the time being the Marriage Law of 1938. On June 26, 1945, the Provisional Government published a further order, No. 31,² to come

¹ Ante, 135.

² Order 31, s. 3 (1), provides:
"Marriages which were solemnized
"during the period from April 1, 1945,
"to the coming into force of this law
"before incompetent lay authorities
"or before ministers of a recognized
"church or religious community have
"the effect of a marriage solemnized
"at a register office in accordance with
"sections 15 et seq. of the Marriage
"Law of July 6, 1938, as from the
"day of solemnization, as soon as they
"have been registered in the family
"book kept by the register office."

Subs. (2): "The offices in which

"such marriages have been solemnized shall forward without delay to the register office which would have been competent to solemnize the marriage at the time of its solemnization in respect of the bridegroom, true copies of the entries made in their marriage register showing exactly the words, figures and letters."

S. 5 (1): "The register offices are to enter in the register the occurrences affecting personal status communicated to them in accordance with sections 3 and 4."

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into force on June 30, 1945, to provide for the validation of ceremonies such as that of May 19, 1945, by registration. The petitioner's mother took no steps to register her first marriage, and after the petitioner's birth in March, 1949, she received information from the registrar in Kitzbühl that it had not been registered. She accordingly went through the ceremony of February, 1950; but in the meantime the Austrian marriage had been registered on July 18, 1949, without her knowledge.

The petitioner sought a declaration that his parents were lawfully married on February 11, 1950, and that by the said marriage he became legitimated as from the date of the marriage.

On February 18, 1952, Barnard J., in a considered judgment, found that the marriage celebrated between the petitioner's parents was invalid, by reason of the retroactive effect of Order No. 31, validating the Austrian marriage, and that therefore the petitioner was illegitimate.

The petitioner appealed.

Heathcote-Williams Q.C. and *Dobry* for petitioner.

Colin Duncan and *B. T. Neill* for Attorney-General.

Latey Q.C., *Crispin* and *Bramall* for Urbanski and the child Barbara.

The arguments were substantially the arguments advanced in the court below and sufficiently appear from the judgment.

Cur. adv. vult.

July 30. The judgment of the court was read by—

SOMERVELL L.J., who, having stated the facts and read the material sections of Order 31, continued:—Mr. Heathcote-Williams' main point for the petitioner can be shortly stated. He admits, of course, that putting aside capacity—and there is no question here of capacity so far as the ceremony of 1945 is concerned—a marriage good by the law of the country where it is effected is good everywhere: *Berthiaume v. Dastous*.³ But he submits that that law, if, as here, it is not the law of the domicile, must be restricted to the law as it is at the date of the ceremony. In principle, this does not appeal to us. Legislative Acts of the kind in question are passed to remedy what has been done in good faith but turns out not to have achieved the result which the parties intended. The defect can only be remedied by the legislature of the place of the marriage. We can see no

³ [1930] A.C. 79, 83.

reason why those who were at the time, or later became, domiciled elsewhere should be impliedly excepted from its provisions.

The argument can be tested by taking cases which are perhaps simpler on their facts than the present. There are many Acts in our statute book validating marriages when it has been discovered that there was some legal flaw which had not been realized, so that a number of marriages celebrated at a particular place or in a particular way are invalid: see Halsbury's Laws of England, 2nd ed., Vol. 16, p. 597. If one of a group so validated had been between parties not domiciled here, it would, on this argument, remain invalid although otherwise, we are assuming, covered by the Act. That such a rule might produce the greatest possible injustice is manifest. Assume parties domiciled here who marry abroad. A flaw is discovered in the foreign country which is then covered by a validating Act. It is possible that the parties might not hear of it. They had no reason to doubt that the marriage as celebrated was valid. It might be discovered after their death that their children were illegitimate. If they did hear of it so that they could go through a second and valid ceremony but children had been born in the meantime, at one time, at any rate in this country, they could not have been legitimated.

Mr. Heathcote-Williams at one time suggested that the validating law should not apply if at the time when it was passed both or perhaps either of the parties had changed their minds and no longer wished to be married. He did not suggest this was the effect of the law in Austria. It certainly would not be the effect of a validating Act in England unless express provision was made to that effect. Whatever may be the legal solution to the problem we are satisfied it is not to be found in any such principle. We were referred to *Lynch v. The Provisional Government of Paraguay*.⁴ In that case a man domiciled abroad had died, disposing by will of property in England. After his death retrospective legislation confiscating his property was passed. Lord Penzance held that succession to property was governed by the law of his place of domicile as it existed at the time of his death. As Barnard J. said, in dealing with that case, the relevant date here is when the second marriage took place. Other distinctions could, if necessary, be drawn. Validation Acts give effect to the intention of the parties at the time of the ceremony. No one would describe the legislation in question in *Lynch's* case⁴ as in any way analogous.

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⁴ (1871) L.R. 2 P. & M. 268.

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Mr. Heathcote-Williams put what is really the same argument in another form. He submitted that when Henryka landed here she was a spinster. On this basis she acquired, as the judge found, a domicile of choice here and her status could not therefore be affected by foreign law. As from June 30, 1945, it seems to us misleading to describe her as a spinster. As from that date her status could be changed into that of a married woman without her consent, on any view, under Austrian law. If, as the judge held, our courts will have regard to a retrospective validating Act in respect of persons domiciled here, then that is an incident in their status which is not affected by a subsequent acquisition of domicile.

We have studied the other cases in our courts which were referred to but we do not get any real assistance from them. The point is a short one and in a special subject-matter. The only cases dealing with that subject-matter to which we were referred were a Canadian and a French decision. In *Doe ex dem Breakey v. Breakey*⁵ the court had to consider the effect in Canada of an Act of the United Kingdom Parliament validating an otherwise invalid marriage in Ireland (An Act for Confirmation of Certain Marriages in Ireland, 5 & 6 Vict. c. 113). The statute was part of the law of Canada, so that was decisive, but the Chief Justice expressed the opinion that effect would have been given to it if it had been the law in Ireland only; "for it is the *lex loci* that must "govern." We respectfully agree. In *Luna c. Godin*⁶ the French court gave effect to a law passed in Mexico validating a marriage between French subjects which was invalid by the law of Mexico at the time of the marriage. In a legally perfect world all systems would apply the same rules to the subject under consideration. It is, therefore, some satisfaction that a French court proceeded on the principle which we regard as right. In *Sottomayor v. De Barros*⁷ it was said: "... the law of a country "where a marriage is solemnized must alone decide all questions "relating to the validity of the ceremony, by which the marriage "is alleged to have been constituted." We see no reason for excluding from that law in this case Order 31 and its effect.

Though we do not base our judgment on the fact that Order 31 was enacted before the parties left Austria, this might have been an obstacle in the way of the petitioner if Mr. Heathcote-Williams' main submission had commended itself to us. It is only necessary

⁵ (1846) Upper Can. Rep. 2 Q.B. 349.

⁶ (1881) 10 Clunet 621.

⁷ (1877) 3 P.D. 1, 5.

to add this. We agree with the judge that a different and more difficult question would have arisen if the second ceremony of marriage had taken place before the registration. In the absence of any express provision under the foreign law, the conclusion might depend on the state of knowledge of the parties as to the likelihood or possibility of validation, so it had better be left to be dealt with if and when it arises. The appeal is, therefore, dismissed.

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Appeal dismissed.

Solicitors: *George & George; Culross & Trelawny; Treasury Solicitor.*

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RICHARDS v. RICHARDS.

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May 8.

Divorce—Desertion—Subsequent adultery—Whether desertion conduct conducting—Termination of desertion by adultery—Burden of proof.

Singleton,
Denning and
Hodson L.JJ.

Conduct only conduces to adultery, when it is such conduct “as is proved to have brought about the adultery.” There must be conduct which is closely and directly connected with the adultery such as exposing a wife to known and obvious dangers. Accordingly, desertion of itself, with no more, is not conduct conducing to adultery.

Herod v. Herod [1939] P. 11, 21 applied.

Quaere whether, in *Parry v. Parry* [1896] P. 37, a decision by a jury, there was any evidence of conduct conducing to adultery.

Where a husband deserts his wife and later the wife commits adultery, the wife's adultery terminates the desertion, unless the wife can show that her adultery has had no effect on her husband's conduct. If she can show (1) that he did not know of the adultery, or (2) that he would never have come back to her again in any event, his desertion continues. If there should be some chance of the husband returning to his wife and her conduct destroys that chance, then the desertion comes to an end when he becomes aware of the adultery, because he then has good cause for staying away from his wife.

Williams v. Williams [1943] 2 All E.R. 746, 748 applied.

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APPEAL from Mr. Commissioner Rewcastle Q.C.

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The parties were married in May, 1947, when the husband was on seven days' leave from his service in the army, the husband being 20 and the wife 19 years of age. They spent two nights together and no more. Having received an anonymous letter stating that his wife was going about with other men, he came back on compassionate leave in November, 1947, for a week-end and his wife made explanations to him which he then accepted, but thereafter he did not return to her. In December, 1947, he wrote her a letter which showed that he intended to desert her. Although he had Christmas leave, he wrote in the letter: "So I shall keep out of your way." From that time on, the commissioner found, he was in desertion. In March, 1948, he went to see the probation officer for advice, as a result of which he wrote to his wife saying that he was going to defend himself if any charge were made against him and suggesting that she might also go to see the probation officer, but she did not do so. He was released from the Army, and he saw his wife once or twice to collect some belongings, but they did not live together.

At the end of 1948 the wife met another man with whom she committed adultery in the middle of the year 1949. Finding that she was pregnant, she went to a solicitor, who, on October 8, 1949, wrote to the husband and informed him that she had committed adultery with one B. on July 30, 1949, adding that she was now pregnant and "we shall be glad to hear that you will "commence divorce proceedings against our client." The three years had not elapsed from the date of marriage and there were no sufficient grounds for an application for leave to bring proceedings within that period. At its expiration the husband obtained legal aid, and in December, 1950, his solicitors wrote to the wife's solicitors asking if the wife and B. would make statements.

The wife's solicitors did not provide statements, but took proceedings for divorce on her behalf on the ground of her husband's desertion. The husband put in a cross-prayer for divorce on the ground of his wife's adultery.

The commissioner held that the husband had deserted the wife and that the wife had committed adultery, but he held that the husband's desertion had conduced to the adultery and, therefore, that the adultery did not terminate the husband's desertion.

He granted the wife a decree and rejected the husband's cross-prayer.

The husband appealed.

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S. Seuffert for the husband. The commissioner's finding that the husband deserted his wife at the end of the year 1947 cannot be challenged; but the desertion ended in 1949, when the wife committed adultery and the husband was informed of that fact by the wife's solicitors, and also of the fact that she was pregnant by reason of the adultery. The husband then had reason for not returning to his wife. The chance of reconciliation was destroyed. The husband gave evidence that when he found that his wife was bearing the child of another man there was no possibility of his returning to her. And the commissioner found that his wife's adultery "may have had some effect on his state of mind."

The commissioner found that the husband's conduct conduced to the wife's adultery and that, therefore, that adultery did not terminate the desertion. But, it is submitted, he was wrong. Desertion alone, without more, cannot conduce to adultery. Conduct only conduces to adultery when it is such "as is proved 'to have brought about the adultery': *Herod v. Herod*.¹ Gorell Barnes J. said that he doubted whether there was any evidence before the jury in *Parry v. Parry*² of conduct conducing to adultery.

Since the husband's desertion terminated in 1949, the commissioner was wrong in granting the wife a decree. The court should have exercised its discretion (notwithstanding that the husband first deserted the wife) and have granted a decree prayed for in the husband's answer, on the ground of his wife's adultery.

W. Kee for the wife. The decision of the commissioner was right. Desertion of itself can amount to conduct conducing to adultery. But there was more here than mere desertion in this husband's treatment of his wife. *Parry v. Parry*² was a much weaker case than this. It is clear that this husband had decided to desert and abandon his wife after he had spent only two nights with her, and that the news in 1949 that his wife had committed adultery had, and could have had, no effect on his resolution. [He referred to *Yeatman v. Yeatman*,³ *Jeffreys v. Jeffreys*,⁴ *Callister v. Callister*⁵ and *Williams v. Williams*.⁶]

¹ [1939] P. 11, 21.

² [1896] P. 37.

³ (1870) L.R. 2 P. & M. 187.

⁴ (1864) 3 Sw. & T. 493.

⁵ [1947] W.N. 221.

⁶ [1943] 2 All E.R. 746.

C. A. SINGLETON L.J. We need not trouble you to reply, Mr. Seuffert. I will ask Denning L.J. to give the first judgment.

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DENNING L.J. The law applicable to the situation of fact proved in this case was stated by Lord Merriman P. in *Herod v. Herod*⁷ in terms which have been repeatedly approved in this court. The wife's adultery does not automatically terminate the desertion; it is, however, a serious prejudice to any hope of reconciliation; so serious, indeed, that it will be held to be one of the causes why there was no reconciliation—and therefore one of the causes of the subsequent desertion—unless she can show that the husband's conduct was not affected by it. If she can show that he did not know of it, or that he would never have come back to her again in any event, his desertion continues; but if there was some chance of his coming back and her conduct destroyed that chance, then his desertion comes to an end when he becomes aware of it, because he then has good cause for staying away. It is very different if his conduct conduced to her adultery because, as the President said⁸: "I do not think that a spouse could be "heard to say that adultery at which he or she has connived or "to which his or her conduct has conduced, is a reasonable "excuse for desertion." That passage was approved and applied in this court in *Callister v. Callister*.⁹

In this case, therefore, the first question is whether the husband's conduct did conduce to the wife's adultery. Conduct only conduces to adultery when it is such conduct "as is proved "to have brought about the adultery": see *Herod v. Herod*.¹⁰ There must be conduct which is closely and directly connected with the adultery, such as exposing a wife to known and obvious dangers. Applying this test, I am clearly of opinion that desertion by itself is not conduct conducing to adultery. It would be deplorable if desertion by one party were thought to be an excuse for the other party to go and commit adultery. It may explain the adultery, but it does not excuse it. During the war it often happened that, when the husband was serving abroad, his wife at home committed adultery; and in the pension cases it was always held that the wife's adultery was not caused by the separation at all, but was due to her own personality and conduct. So it seems to me in these cases when there is desertion and nothing more, and then the wife commits adultery, her adultery is not due to

⁷ [1939] P. 11.

⁸ Ibid. 24.

⁹ [1947] W.N. 221.

¹⁰ [1939] P. 11, 21.

the desertion, but is due to her own weakness of character; or, as no doubt she would prefer to put it, because she fell in love with another man. That is the case here. A year after the desertion she fell in love with another man, and she committed adultery with him. The adultery is due to her own weakness of character and not to the desertion.

We were referred to *Parry v. Parry*,¹¹ in which there was a separation without any fault on the part of the husband, and, nevertheless, a jury found that his conduct conduced to the adultery. Gorell Barnes J. doubted himself whether he would have found that there was conduct conducing. I think that his doubts were well founded. I should have thought there was no evidence in that case of conduct conducing to adultery.

Mr. Kee argued that in this case there was something more than desertion, but it is significant that in the pleadings it was never alleged that the husband's conduct had conduced to the adultery. That does not prevent the court from considering it; it may have to do so; but, nevertheless, if the wife does not allege it, it does go to show that there is nothing in the contention. This wife was not left destitute. After her husband deserted her, she was living at home with her parents, and going out to work and earning her living in the same way as she had done before the marriage. She said in evidence that she did not take proceedings in the magistrates' court against her husband for desertion because she did not want money. She was earning enough as she was. In those circumstances it seems to me to be plain that his conduct did not conduce to her adultery. There were the usual features of such a case, that he wrote an unkind letter, that he treated her unkindly on some occasions before the desertion, and so forth; but it seems to me that in substance there is nothing more than desertion. Even taking into account the extra incidents relied on by Mr. Kee, I do not think there was any evidence of conduct conducing to adultery. I, therefore, find myself unable to agree with the finding of the commissioner on that point.

Once it is found that the husband's conduct did not conduce to the wife's adultery, then it follows that her adultery terminated his desertion, unless she can show that it did not. The burden is on the wife to show that her adultery had no effect on the husband's conduct at all. It must be shown, in the words of Lord Greene M.R. in *Williams v. Williams*,¹² that her adultery

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¹¹ [1896] P. 37.¹² [1943] 2 All E.R. 746, 748.

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did not affect the husband's attitude towards her in the way of impeding a possible reconciliation in future. The commissioner found, in effect, that she had not discharged the burden of proof. He said that the adultery "may have had some effect on his "state of mind." The husband gave evidence that it did. He said that when he found that she was bearing the child of another man there was no possibility of his going back. On that finding of fact by the commissioner (which is amply supported by the evidence) the wife has failed to prove that her adultery had nothing to do with his subsequent desertion.

So the result of the case is this: There was desertion by the husband in December, 1947; the wife committed adultery in the middle of 1949; but when the husband got to know of it, his desertion ended, because he then had good cause for staying away. She cannot, therefore, succeed on her petition for divorce on the ground of his desertion.

The remaining question is whether the husband should succeed on his cross-petition for divorce on the ground of her adultery. The adultery is established, but, nevertheless, as he deserted her first, that is a ground on which this court has a discretion to refuse his petition. We have been referred to several of the old cases, and among them to *Jeffreys v. Jeffreys*.¹³ The court in those days refused the husband in such circumstances a divorce, but the exercise of discretion nowadays is very different from what it was in 1864. What is to be done in this case? The wife wants a divorce so that she can marry the other man whose child she has borne. In the interests of the child, and, indeed, in the interests of everyone, seeing that this marriage has come to an end—it only lasted a day or two—the right course is that the court, in the exercise of its discretion, should grant a divorce on the cross-petition of the husband. The result, therefore, is that the appeal, in my opinion, should be allowed; the wife's prayer should be rejected, and the husband's cross-prayer for divorce should be granted.

In the result, it seems a great pity that the original course suggested by the wife's solicitors in October, 1948, was not adopted. If the husband had simply sued for divorce on the ground of adultery, to which there was no defence, all these costs would have been saved. Still, the parties are entitled to have the matter thrashed out, and, in my opinion, the result should be as I have stated.

¹³ 3 Sw. & T. 493.

HODSON L.J. I agree, and have nothing to add. I think the order of the court should be that the prayer of the wife's petition should be rejected, and a decree pronounced on the answer of the husband.

SINGLETON L.J. I also agree.

Appeal allowed.

Prayer of wife's petition rejected.

Decree pronounced on husband's answer.

Solicitors: *Smiles & Co.; Edward Fail & Co.*

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CHURCH v. CHURCH.

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June 30;

July 1, 2.

Husband and wife—Desertion—Deserted spouse's confession of adultery and expressed desire for divorce—Desertion not necessarily terminated.

Willmer J.

Once desertion has been started by the fault of a deserting spouse it is no longer necessary for the deserted spouse to show that during the material period he actually wanted the other spouse to come back. An intimation therefore by a deserted husband to his wife that he has committed adultery and desires divorce proceedings to be instituted against him does not necessarily terminate desertion provided that he can prove affirmatively that the wife had already arrived at an unshakable determination not to live with him again before she discovered the adulterous conduct, and independently of that conduct.

Sifton v. Sifton [1939] P. 221; *Herod v. Herod* [1939] P. 11 followed and applied.

A wife was alleged to have deserted her husband in 1946. In early 1949 the husband began to live in adultery with another woman, and later that year he wrote to the wife admitting his adultery and in effect suggesting that his wife should use that information for the purpose of instituting divorce proceedings against him. The wife took no action upon that letter and ignored it, and the husband subsequently presented a petition for divorce on the ground of desertion. The wife by her answer denied desertion and prayed for a decree on the grounds both of desertion and adultery.

Held, (1) that on the facts the wife was the deserting party in 1946; (2) that the husband's adulterous conduct, and his disclosure of that conduct, had not in any way affected the wife's state of mind;

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(3) that that conduct and disclosure did not in those circumstances affect the presumption in the husband's favour, and against the deserting wife, that the desertion continued; (4) that in the exercise of the court's discretion, and in view of the serious nature of the faults committed by both parties, both parties were entitled to a decree *nisi*.

DEFENDED divorce suit.

The parties were married in 1942, when they were in the Forces. The husband came from the South, the wife from the North of England, and during the war they mostly lived together, when this was possible, in the North. The husband was discharged because of his asthma in January, 1946, and went to his former home in Woking after the parties had agreed that the South would be better for the husband's complaint than the wife's home in County Durham. The wife, however, objected to such accommodation as the husband was able to find, and after certain abortive discussions the wife took out summonses on the grounds of desertion and wilful neglect to maintain. The matter was heard before the justices, who dismissed the summons for desertion, but made an order on the ground of wilful neglect to maintain, on November 28, 1946, after adjourning the case with a view to exploring the possibility of a reconciliation. During the adjournment the husband wrote certain letters to the wife in which he asked her if she was going to live with him; the wife failed to reply. The husband also made an offer to resume cohabitation at the adjourned hearing. There was no appeal against the order. Not long after the order had been made the husband moved into lodgings in the house of a woman to whose daughter he had earlier been engaged. At the end of 1948 the daughter returned to live with her mother after a divorce, and in February, 1949, she and the husband started to live together. The husband asked the court to exercise its discretion in respect of this adultery, stating that they wished to marry.

In July, 1949, the husband wrote to the wife making a full and frank confession of his adulterous association, and in effect suggested that his wife should use that information for the purpose of instituting divorce proceedings against him.¹ She took no

¹ The text of the letter was as follows: "Dear Ann, You will no doubt be very surprised to hear from me after nearly 3½ [sic] years. But on paying a short visit to [his address] mother told me that you had written to her mentioning the

" fact that you wanted to divorce me. Both mother and Peggy explained to me the woman's side of a matrimonial tangle. Mother and Peggy agree with me that I should write to you and give you the chance to free yourself from me and find

steps, however, to have the marriage dissolved, and in due course the husband presented his petition for divorce on the ground of desertion. The wife denied desertion, and asked for a decree on the grounds of desertion and adultery.

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David Henderson for the wife. I dispute that the wife was in desertion. But should she be held to have been initially in desertion, and should it also be held that *Herod v. Herod*² could not apply in her favour, and that her animus deserendi was not affected by her knowledge of the husband's adultery, I rely upon dicta in *Pratt v. Pratt*,³ where Lord Macmillan said⁴: "In

"happiness that we together could
"never find. I could never make you
"happy no matter how much I tried
"because you classed everything above
"me. My opinion is now that our
"marriage was a terrible mistake,
"as you must agree, we were never
"suited to each other, and on my
"return from overseas, I realized
"that. When I offered you a home
"you refused to leave your father and
"come and live down South with me.
"Then when we went to court I gave
"you the chance again to be happy
"and settle down with me but you
"flatly refused to even try even for
"the boys' sake and as you quoted
"you didn't want anything more to
"do with me.' There and then I
"made up my mind that we would
"never come together again. I need
"not write and tell you anything about
"myself as I am very happy with life,
"but I want to be fair with you. You
"see Ann you deprived me of a happy
"married life with the love of a wife
"and two boys so its only natural that
"a young fellow like myself should
"seek that happiness and love of a
"woman and children elsewhere. So
"you can't blame me because I am
"living with a woman that I used
"to court when I was only 17, was
"engaged to her, until she broke it
"off just before I met you. This
"woman's mother is the person who
"was my landlady when I went into
"lodgings just after I was demobbed.
"Then I became friendly with Eileen
"again after her divorce was granted
"and we were living together at her

"mother's home where I was in lodg-
"ings and when Eileen went back to
"her own house I went to live with
"her there as she has no children
"because her only son died just after
"it was born. We both go out to
"work and I just pay her the lodging
"and board money for myself and she
"pays her own way, in fact Eileen
"always pays for us both when we go
"out anywhere as by the time I have
"paid my board and lodgings, sent
"you money and paid the normal
"expenses, i.e. cigarettes, etc., I have
"nothing left as I'm taxed as a single
"man. In fact Eileen earns more
"than I do after I have sent your
"money off. But she doesn't mind
"going out to work as she knows that
"I could never afford to keep her, and
"she doesn't mind carrying on the
"way we are. You see Ann when I
"offered you a home down South here
"with me and you refused on two
"occasions you really deserted me
"and then there was something that
"happened up your father's home that
"I could never forget or forgive, so
"if you want to be free from me
"and divorce me as I never intend
"to come back to you now, you can
"please yourself if you take evidence
"against me with this letter. Inci-
"dently Ann would you please be so
"kind to send me my silver cup and
"stand sent to me by the Royal Navy
"for football in Middle East. Cheerio,
"Ken."

² [1939] P. 11.

³ [1939] A.C. 417.

⁴ Ibid. 420.

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“fulfilling its duty of determining whether on the evidence a case of desertion without cause has been proved the court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. If on the facts it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion.”

When the deserted husband in this case communicated his irrevocable intention never to resume cohabitation with his wife, the separation from that moment became consensual, or was at least no longer against his wish.

J. S. R. Abdela for the husband.

WILLMER J. stated the facts and continued:—On the authorities it is, of course, for the husband to satisfy me affirmatively that his adulterous conduct, and his disclosure of that adulterous conduct to his wife, did not in any way affect the wife's state of mind. It is for him to prove affirmatively that she had already arrived at an unshakable determination not to live with him again before she found out about the adulterous conduct, and quite independently of the adulterous conduct.

That seems to me to be the effect of the recent decision of the Court of Appeal in *Richards v. Richards*.⁵ In that case it was decided by the Court of Appeal that the adulterous party had failed to discharge the burden of proof which was on him. In the present case I think that the husband does discharge the burden of proof. I find that long before the husband's adultery commenced this marriage was irrevocably broken by the wife's desertion, which dated from at least as early as November, 1946. I am satisfied that she had irrevocably arrived at the decision that she would never live with her husband again, and that in the circumstances her conduct was quite unaffected when she learned of her husband's adulterous association.

That being so, the President's often quoted decision in *Herod v. Herod*⁶ applies to this case so far as concerns the husband's claim for relief; that is to say, the fact of his committing adultery is no obstacle, on the facts of this case, in the way of his saying that the wife's offence of desertion was continuing. It becomes a matter for my discretion whether, having regard to his adultery,

⁵ Ante, 307.

⁶ [1939] P. 11.

I ought to grant him the relief which he asks on the ground of the wife's desertion.

In saying that I am not forgetting the argument that in order to obtain relief on the ground of desertion a petitioner always has to prove that during the statutory period the absence of his or her spouse was without his or her consent. It is contended that when an adulterous association is found to be continuing for two or three years before the presentation of the petition, it becomes impossible for the husband to prove desertion because he cannot say that during the statutory period the absence of the wife was without his consent. This is an argument which at first sight appears to obtain some support from a dictum of Lord Macmillan in *Pratt v. Pratt*,⁷ to which I was referred this morning. Lord Macmillan is reported as having said this⁸: "In fulfilling its duty of determining whether on the evidence a case of desertion without cause has been proved the court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. If on the facts it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion."

It is said that that sentence aptly applies to the present case, because ever since 1949 this petitioning husband had made it plain to his deserting wife that he would not receive her back. What Lord Macmillan said was, of course, obiter; it was not necessary for the decision of that particular case. But, coming from that source, it is a dictum to which one naturally pays a good deal of respect.

On the other hand, counsel for the wife frankly admits that he cannot find any authority which fully supports that proposition; and it seems to me that so far as my judgment in this case is concerned I am really bound by authority to the contrary. To my mind the point under discussion is concluded so far as I am concerned by the decision of this court in *Sifton v. Sifton*.⁹ That case seems to me to be authority for the proposition that once desertion has been started by the fault of the deserting spouse it is no longer necessary for the deserted spouse to show that during the three years preceding the petition he actually wanted the other spouse to come back. It will, I think, be helpful if I read part of the headnote, which seems to me admirably to sum up

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⁷ [1939] A.C. 417.

⁸ Ibid. 420.

⁹ [1939] P. 221.

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what was the effect of Henn Collins J.'s decision. It reads as follows: "... When a spouse is deserted, he or she is in the "position that the presumption is in his or her favour and against "the deserting spouse. It is not until some offer to return is "made by the deserting spouse that the question arises whether "it is an offer which ought, in all the circumstances, to be "accepted. Notwithstanding that the husband did not expect "or really want his wife to come back, it was not incumbent on "him to show that he was at all times during the three years "next preceding the petition ready and willing to receive her."

That decision really concludes this question in favour of the husband. Nothing has happened here to stop the wife's desertion, which started in 1946, from continuing to run, and nothing has happened to disentitle the husband from asserting that his wife has continued in a state of desertion. Of course, had there been a bona fide and genuine offer to return on the part of the wife, which the husband had refused because of his new association with this other woman, matters might have been very different; but that is not this case.

The situation, therefore, is that upon the facts of this case I am satisfied that this wife was in desertion, and that her desertion continued during the statutory period. I am also satisfied, on the other side, from the husband's own evidence, that he in his turn was guilty of the matrimonial offence of adultery. The question therefore arises what I ought to do about it in the circumstances. Clearly it is a matter for my discretion either way. It is within my discretion to grant relief to the husband, notwithstanding his adultery which was subsequent to the time of the wife's desertion; equally it is within my discretion to grant relief to the wife on the ground of the husband's adultery, notwithstanding that for three years or so before the adultery began she had been in a state of desertion which still continues. It is within my discretion, if I think it is right, in all the circumstances, to withhold relief from both parties. Finally, it is within my discretion, as was suggested by the House of Lords in *Blunt v. Blunt*,¹⁰ and as has since been ordered from time to time in this court, to grant relief to both parties.

It is interesting to observe that in the particular case I have just referred to, namely, *Sifton v. Sifton*,¹¹ having decided the point about desertion in the way that he did, Henn Collins J. after a good deal of hesitation eventually decided to exercise his

¹⁰ [1943] A.C. 517.

¹¹ [1939] P. 221.

discretion in favour of the party who had been the deserting party. Of course, the decision on the facts of one case does not in the least govern the decision on the facts of another. But I am faced with the same sort of problem in this case which he quite obviously found so difficult to decide in the *Sifton* case. As Henn Collins J. pointed out in *Sifton v. Sifton*,¹² from a financial point of view it probably makes very little difference what actual decree is pronounced. My view of the conduct of the parties sufficiently appears from what I have already said, and I do not think that the question whether the wife ought or ought not to be granted some allowance will really be affected in the least by the way in which I exercise my discretion as to granting or refusing a decree.

I have endeavoured to bear in mind the serious nature of the faults committed on both sides. I wish to stress that, because desertion is always a serious offence, and the adultery in this case is no casual lapse; it is a course of conduct consciously and deliberately pursued over the years. Bearing in mind, therefore, the serious nature of the faults committed on both sides, I think I shall best give effect to the realities of the case if I say that in my discretion each party ought to be entitled to a decree against the other, and I propose to order accordingly.

Decree nisi to both parties.

Solicitors: *Joynton-Hicks & Co., for W. Davies & Son, Woking; Parry-Jones, Law Society Divorce Department, for Norman Barwick, Law Society Divorce Department, Newcastle-upon-Tyne.*

J. B. G.

¹² [1939] P. 221, 227.

IN THE GOODS OF HARRIS, DECD. *MURRAY v. EVERARD.*

Probate—Will—Testator's signature in top right hand corner—No due execution—Wills Act, 1837 (1 Vict. c. 26), s. 9—Wills Act Amendment Act, 1852 (15 Vict. c. 24), s. 1.

The deceased had written across the top of a disputed testamentary document the words "My last will and testament." Immediately below these words, but on the right-hand side of the paper,

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was her signature. The names of the witnesses, and the date, were written at right angles to the body of the document and on the right-hand side of the paper. The whole of the paper, which was some four inches square, was covered in writing:—

Held, that the signature of the deceased in that position could not be said to be “placed at or after, or following, or under, or “beside, or opposite to the end of the will” within the meaning of section 9 of the Wills Act, 1837, as amended by section 1 of the Wills Act Amendment Act, 1852, and the document could not therefore be admitted to probate.

In re Stalman, Stalman v. Jones [1931] W.N. 143; 145 L.T. 339 followed and applied. *In the Goods of Hornby, decd.* [1946] P. 172; *In the Estate of Roberts, decd.* [1934] P. 102; *In the Goods of Usborne, decd.* (1909) 25 T.L.R. 519 distinguished.

PROBATE ACTION.

The deceased, Louisa Annie Harris, died in February, 1951. Two testamentary documents were considered in the action, one executed on September 24, 1939, the other on July 24, 1950. The plaintiff by his statement of claim alleged that the true last will of the deceased was that executed in 1939, and that the document of 1950 had not been duly executed according to the provisions of the Wills Act, 1837, as amended in 1852.¹ He put

¹ The Wills Act, 1837, s. 9: “No will shall be valid unless it shall be “in writing and executed in manner “hereinafter mentioned; (that is to “say,) it shall be signed at the foot “or end thereof by the testator, or by “some other person in his presence “and by his direction. . . .”

The Wills Act Amendment Act, 1852, s. 1: “Where by an Act passed “in the first year of the reign of Her “Majesty Queen Victoria, intituled “‘An Act for the Amendment of the “‘Laws with respect to Wills,’ it is “enacted, that no will shall be valid “unless it shall be signed at the foot “or end thereof by the testator, or by “some other person in his presence, “and by his direction; every will “shall, so far only as regards the “position of the signature of the “testator, or of the person signing “for him as aforesaid, be deemed to “be valid within the said enactment, “as explained by this Act, if the “signature shall be so placed at or “after, or following, or under, or “beside, or opposite to the end of the “will, that it shall be apparent on

“the face of the will that the testa-
“tor intended to give effect by such
“his signature to the writing signed
“as his will, and no such will
“shall be affected by the circum-
“stance that the signature shall not
“follow or be immediately after the
“foot or end of the will, or by the
“circumstance that a blank space
“shall intervene between the con-
“cluding word of the will and the
“signature, or by the circumstance
“that the signature shall be placed
“among the words of the testimonium
“clause, or of the clause of attesta-
“tion, or shall follow or be after or
“under the clause of attestation,
“either with or without a blank
“space intervening, or shall follow or
“be after, or under, or beside the
“names or one of the names of the
“subscribing witnesses, or by the cir-
“cumstance that the signature shall
“be on a side or page or other por-
“tion of the paper or papers contain-
“ing the will whereon no clause or
“paragraph or disposing part of the
“will shall be written above the sig-
“nature, or by the circumstance that

the defendant to proof that the provisions of the statute had been complied with in respect of that document, and further alleged that it had not been signed "at the foot or end thereof." He claimed that the court should pronounce against the document of 1950, and for the document of 1939, in which he was named as executor.

The defendant, the residuary legatee under the document of 1950, alleged that that document was the true last will of the deceased, that "it was written on one sheet of paper and the signature of the deceased and the attesting witnesses were made in the margin thereof, there having been no room, or no sufficient room at the foot or end thereof for the said signatures," and that it had been duly executed. He claimed probate of that will or, in the alternative, that if the earlier document had not been revoked by the later, both should be pronounced for as together constituting the last will of the deceased.

In view of the decision of the court, no question arises in this report upon the alternative claim. The disputed testamentary document was written on a small piece of paper some four inches square which had been torn from a larger piece of paper before it was written on. The handwriting was that of the deceased, who had written across the top "My last will and testament" and immediately below this, but on the right-hand side of the paper, the signature "L. Harris."

Below the level of that signature, and on separate lines, were the names of certain persons with pecuniary legacies written against them. Opposite the list of names and legacies, but at right angles and along the right-hand side, was the date—July 24, 1950. Continuing down the side of the paper, on the right, were the signatures of the witnesses. Below these and across the page were a reference to certain assets, three more legacies and a residuary bequest. The whole of the paper was covered with the writing.

"there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above

"enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."

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A. H. Ormerod for the plaintiff.

A. Richard Ellis for the defendant.

[The cases relied upon in argument are as cited in the judgment. *Ellis* referred also to Mortimer on Probate Law and Practice, 2nd ed., at p. 102, n. (g).]

WILLMER J. I am much indebted to counsel on both sides for their very interesting arguments. The case raises a difficult question with regard to a document which is put forward by the defendant as being a will of Miss Louisa Annie Harris, who died on February 2, 1951. The question is whether that document is a valid testamentary document; and that, in its turn, depends upon whether it was duly executed in accordance with the provisions of the Wills Act, 1837, as amended by the Act of 1852.

It is necessary, in order to understand what I am about to say, to describe the form of the document which is propounded.

[His Lordship did so and continued:] The question arises whether a document bearing the signature of the testator and the signatures of the attesting witnesses in the positions which I have described is such as to come within the provisions of the Act of 1852. By section 9 of the Act of 1837 it was provided that no will was to be valid unless signed at the foot or end thereof. That provision was amended by section 1 of the Act of 1852. [His Lordship read the section, emphasizing the concluding words, and continued:] The question which I have to determine is whether it is apparent on the face of this document that the testator, having regard to the position in which her signature appears, intended to give effect by her signature to the document as a whole.

Prima facie, it cannot be said that a signature written in the position which I have described, namely, in the top right-hand corner of the document, is "placed at or after, or following, or "under, or beside, or opposite to the end of the will." Were it not for the fact that I have had cited to me a number of decisions of this court, dealing with unusual signatures in other cases in which it has been held to be apparent that the testator intended to give effect to a document as his will, I should have thought it was barely open to me to say that the signature in this case came within the provisions of the Act.

However, I must deal with the cases that have been cited to me. Three of them were cases in which the signature may be described as being in the margin of the will. I use the word "margin" in relation to these other cases, because I think that

it is appropriate in those cases. It would not be appropriate to describe the signature in this case as being in the margin, because if one looks at the document which I have before me as a whole one cannot really say that there is any margin at all. The whole width of the paper is written across.

In *In the Goods of Hornby, decd.*,² which is the most recent decision on the provisions of the Act of 1852, Wallington J. held that what may be described as a marginal signature was such as to make it apparent on the face of the will that the testator did intend to give effect to the document as his will. In that case, however, what has been described as a " box " had been specially prepared in the margin of the will, and ruled off with lines, for the insertion of the signature. It was a very unusual document, the form of which is reproduced in the Report.³ In those very unusual circumstances, Wallington J. came to the conclusion that by signing it in that way the testator manifested an intention that the signature so placed should authenticate the whole document; that is to say that the signature made it apparent on the face of the will that the testator intended to give effect by it to the writing signed as his will.

The next case to which I wish to refer, the last one before *In the Goods of Hornby, decd.*,⁴ is that of *In the Estate of Roberts, decd.*⁵ That was also a case of a marginal signature, which Lord Merriman P. held to be adequate in the circumstances to give effect to the will. In that case the body of the will was extended over the whole length of the piece of paper on which it was written, so that there was no room at the foot for the signatures of the testator and witnesses. The paper was accordingly turned sideways, in the way that some people who write letters and do not want to use an extra sheet of paper turn their letters sideways for the purpose of signing them, and the signature of the testator and the signatures of the witnesses were written in the margin at right-angles to the main body of the will. Lord Merriman P. held that by signing in that way the testator made it apparent on the face of the will that he intended to give effect to the document as his will.

The third case to which I must refer, in which what I may call a marginal signature was held to be sufficient, was that of *In the Goods of Osborne, decd.*⁶ The case, unhappily, is not very fully reported. It appears that the testator was too ill to

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² [1946] P. 172.

³ Ibid. 173.

⁴ [1946] P. 172.

⁵ [1934] P. 102.

⁶ (1909) 25 T.L.R. 519.

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sign and made a cross in the margin, which was duly witnessed by witnesses, who also signed in the margin. The case came before the court apparently on motion. There was no opposition. The matter does not appear to have been argued at all, or at any rate not fully argued, and unhappily the report does not disclose what were the reasons, if he stated them, why the judge, Bargrave-Deane J. came to the conclusion that that particular document was signed in such a way as to make it apparent on its face that the signature was intended to give effect to it as the testator's will. However, the judge in that case did so decide, and he did admit the document to probate.

Those three cases were all relied on by counsel for the defendant in propounding this document as being a valid will. But the answer to his argument in relation to all three of those cases is that they are not this case. This is not a case where a special place or "box" has been prepared at the side of the document for the signature to be inserted; it is not a case where, the paper being otherwise full, the testator has turned it sideways and signed in the margin, which might very well be taken, in accordance with the habits of ordinary letter writers, to be a continuation from the bottom of the page; nor is it the case of a testator being incapable of writing, and merely making his mark by means of a cross.

It was argued by Mr. Ellis that I could not decide against him and in favour of the plaintiff in this case without saying that these three cases were all wrongly decided. I do not agree with that submission, because I do not think any of those three cases governs what I have to decide in the present case. As far as I know, there is no case in the books which is precisely similar to this case. In my judgment, the nearest case is one which was decided in the Court of Appeal, *Re Stalman*, *Stalman v. Jones*.⁷ That was a case in which, again, the body of the will continued right down to the bottom of the page, so that there was no room for signatures at the bottom. The signature of the testator and the signatures of the attesting witnesses were written in the space at the top of the document, so that the whole of the rest of the document followed the signatures of the testator and the witnesses. In that case it was held by the Court of Appeal that the document could not be admitted to probate. I do not think I need read the whole of that case, but it is of course binding upon me unless I can distinguish it. It is said that it is distinguishable

⁷ [1931] W.N. 143; 145 L.T. 339.

because in that case the document started with the signatures of the testator and the witnesses, whereas the document in this case starts with the words "My last will and testament," and the signature is tucked away underneath that sentence and over on the right-hand side of the paper. To my mind, that is not really a valid distinction. It seems to me that in effect the signature in this case really forms part of the heading of the document; that is to say, it virtually runs in this way: "My last will and testament. L. Harris." Following that come the dispositive provisions. If that is the correct way of looking at this document (and it is the way in which it appeals to me at first sight) I can see no distinction in principle between this case and that of *Re Stalman*,⁷ in which, as I say, the Court of Appeal refused to hold that there was a valid execution in accordance with the provisions of the Act. That decision of the Court of Appeal is not only binding upon me, but it also confirms the view which, as I said, I would in any case have formed without the assistance of previous decisions. Unassisted, I would have said that there was no alternative but to say that this signature did not come within the statute. Fortified by that decision of the Court of Appeal, which I do not see how to distinguish, I am satisfied that my decision must be against the defendant who propounds this will.

Earlier will pronounced for.

[The defendant was allowed costs out of the estate taxed as between solicitor and client.]

Solicitors: *Knapp-Fisher, Wartnaby & Blunt; Ellis, Piers & Co.*

J. B. G.

⁷ [1931] W.N. 143; 145 L.T. 339.

IN THE GOODS OF GUSTAV KAUFMAN, DECD.

1952
June 10, 23.

Administration—Grant—Intestacy—Foreign domicile of deceased—Person entitled to grant—Applicability of foreign law—Procedure direction—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 162—Administration of Justice Act, 1928 (18 & 19 Geo. 5, c. 26), s. 9.

Lord Merri-
man P.

When the deceased has died domiciled abroad the proper course, generally speaking, is to make a grant of letters of administration in England either to the person who has actually been entrusted

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with the administration by the court of the deceased's domicile or to the person who is by the law of the deceased's domicile entitled to administer the estate. In either case it is perfectly correct that such a grant should be made as a "section" grant.

The practice in such cases, where the deceased has died domiciled abroad, of making grants of administration to those persons who, according to English law and practice, would have been entitled to a grant if the deceased had died domiciled in this country, is incorrect, although such a course may be taken in exceptional circumstances.

The deceased died in a concentration camp domiciled in Holland. His daughter, the only person entitled by Dutch law to his estate, died without taking administration upon herself. The brother of the deceased, who had been previously granted letters of administration to the daughter's estate by the Principal Probate Registry, applied for a grant to administer the deceased's estate in England as the person entitled to such grant under English law:—

Held, that although such a grant would not be in conformity with the correct practice, it was convenient that the applicant, having already obtained the grant to the daughter's estate, should administer the deceased's estate also, and an order might accordingly be made in his favour under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended in 1928.

In the Goods of Earl (1867) L.R. 1 P. & M. 450; *In the Goods of Briesemann* [1894] P. 260; *In the Estate of Humphries* [1934] P. 78 followed; *Duncan v. Lawson* (1889) 41 Ch.D. 394 distinguished.

APPEAL from registrar.

Gustav Kaufman died intestate in a concentration camp in Poland in 1943. At the date of his death he was domiciled in Holland. He was survived by his daughter, Martha Sara Levy, who was by Dutch law the only person entitled to his estate, but she subsequently also died without having obtained any grant of administration in respect of her father's estate. Gustav Kaufman left estate in England worth £153.

On June 8, 1951, letters of administration to the estate of Martha Sara Levy were granted in England to Leo Kaufman, a brother of Gustav Kaufman. In April, 1952, application was made by Leo Kaufman for a grant of letters of administration to the estate of Gustav Kaufman. He applied as the person entitled to such grant according to English law. The application was refused by Mr. Registrar Long, who relied upon a procedure direction dated March 1, 1951,¹ and held that evidence must be

¹ The following is the text of the procedure direction: "As from June 1, 1951, the practice whereby a person, who would have been entitled to a

"grant of administration or of administration with will had the deceased been domiciled in England, has been allowed to apply for and obtain such

filed as to the person who, according to Dutch law, would be entitled to administer the estate, and that it was that person who must apply in England. The applicant appealed, and the summons was adjourned into court for argument and judgment.

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A. Richard Ellis for the applicant. A procedure direction is not binding on the court and the direction in question seeks to reverse an established practice. By giving a general direction it fetters the discretion conferred on the court by section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925 (as amended in 1928).

The previous practice was a sound one which may, it is submitted, be followed. It has been acted on for many years, and is in accord with judicial decision: see *Duncan v. Lawson*²; *Pepin v. Bruyère*³ (in which that case was considered by the Court of Appeal⁴). Moreover, it saves small estates, such as the present one, the expense of expert evidence as to foreign law.

The new direction imposes on applicants a duty to proceed under foreign law, and therefore the applicant would normally have a right to obtain a grant according to foreign law, and the registrar would be bound to make such a grant. This is contrary

" a grant, will be discontinued. The
" grant will be made by order to the
" person entrusted with the adminis-
" tration by the court of the deceased's
" domicile or entitled to administer by
" the law of the deceased's domicile
" unless, in special circumstances, an
" order to the contrary is made by the
" court. Where the law of the place
" of the deceased's domicile, does not
" require or provide for the obtaining
" of a grant or an order authorizing
" administration of the estate, or
" where there is for other reasons no
" necessity or intention of obtaining
" a grant or the necessary authority
" to administer the estate in that place
" of domicile, an affidavit of law will
" be required stating:—(1) Whether
" the applicant is the person entitled
" to apply for a grant or order autho-
" rizing administration in that place;
" or (2) whether the applicant would,
" without a grant, be entitled to
" administer the estate in that place
" subject to certain formalities, setting

" out the nature of those formalities;
" or (3) whether the applicant is
" entitled to administer the estate in
" that country, any necessary forma-
" lities having been observed. In
" cases (1) and (2) above, an order
" for the grant may be made under
" section 73 of the Court of Probate
" Act, 1857, or section 162 of the
" Supreme Court of Judicature (Con-
" solidation) Act, 1925, as amended
" by section 9 of the Administration
" of Justice Act, 1928, whichever is
" applicable, subject to affidavit evi-
" dence as to the facts. The registrar
" may, in a proper case, make such
" an order whatever the gross value
" of the estate. In case (3) the order
" will be for a grant to the person
" entitled by the law of the place of
" the deceased's domicile to administer
" the estate in that place. H. A. de
" C. Pereira, Senior Registrar."

² (1889) 41 Ch.D. 394, 397.

³ [1902] 1 Ch. 24.

⁴ Ibid. 26.

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to the conception of the discretion of the court in such matters and also to the old-established practice referred to in Dicey's Conflict of Laws, 6th ed., at p. 451.

Moreover it would appear not to recognize the clear distinction drawn in English law between administration and succession, for an administrator does not necessarily derive his right to administer from his own title to succeed, whereas under most continental systems of law the idea of administration apart from succession does not exist.

It is conceded that Mortimer on Probate Law and Practice, 2nd ed., at p. 35, where *In the Goods of Johnston*⁵ is cited, and *In the Estate of Humphries, decd.*,⁶ appear to be against my submission.

Victor Russell (instructed by the Treasury Solicitor) as amicus curiae, referred to *In the Goods of Earl*⁷; *In the Goods of Cosnahan*⁸; *In the Goods of Briesemann*⁹; *In the Goods of Von Linden*¹⁰; *In the Goods of Meatyard*¹¹; *In the Estate of Eugene Cocquerel*¹²; *In the Estate of Humphries*¹³; *Isabella Stewart*¹⁴; *In the Goods of David Rogerson*¹⁵; *Visca v. D'Aramburu*.¹⁶ He submitted that the practice which had grown up of recent years was not supported by the older authorities.

Ellis in reply. In the cases referred to a grant had already been made by a court of the domicile.

Cur. adv. vult.

LORD MERRIMAN P., reading his judgment, said:—This is an application by way of appeal from a direction of Mr. Registrar Long, in connexion with an application for letters of administration to the estate of Gustav Kaufman, deceased, by his brother, as being the person entitled in English law to a grant of administration. The registrar directed that evidence should be filed as to the person who, according to Dutch law, would be entitled to administer the estate. In so doing he was founding himself on a procedure direction of March 1, 1951.¹⁷ The real substance of this appeal is to challenge the propriety of that direction.

⁵ (1832) 4 Hagg.Ecc. 182.

⁶ [1934] P. 78.

⁷ (1867) L.R. 1 P. & M. 450.

⁸ (1866) L.R. 1 P. & M. 183.

⁹ [1894] P. 260.

¹⁰ [1896] P. 148.

¹¹ [1903] P. 125.

¹² [1918] P. 4.

¹³ [1934] P. 78.

¹⁴ (1838) 1 Curt. 904.

¹⁵ (1840) 2 Curt. 656.

¹⁶ (1839) 2 Curt. 277.

¹⁷ [1951] W.N. 167.

Let me say at once that the direction was published by my authority in order to effect a change in the practice of the Principal Probate Registry; but being a mere administrative direction regarding practice, it has no binding force, and is plainly open to modification or reversal by judicial decision. As the point at issue is one of general interest in connexion with grants of administration to the estates of persons dying domiciled in foreign countries, the Treasury Solicitor has been good enough to assist the court, and to instruct counsel, so that all relevant considerations might be laid before me. I am greatly indebted to both counsel for their assistance.

The history of the matter is that for some time past the practice had grown up in such cases of making grants of administration to those persons who, according to English law and practice, would have been entitled to a grant if the deceased had died domiciled in this country. It is not clear when or how this practice first arose. However it originated, the registrars of the Principal Probate Registry unanimously came to the conclusion in 1950 that the practice was wrong, and that, speaking generally, the proper course was to make a grant either to the person who had actually been entrusted with the administration by the court of the deceased's domicile, or was by the law of the deceased's domicile entitled to administer the estate, but, of course, without prejudice to the right to make a grant to other persons by virtue of the discretionary powers contained in section 73 of the Court of Probate Act, 1857, or section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by section 9 of the Administration of Justice Act, 1928, and commonly referred to as a "section grant."

The leading authority after the Court of Probate Act, 1857, is the decision of Lord Penzance in *In the Goods of Earl*.¹⁸ After examining the older authorities he said¹⁹: "The result of the "cases is that in the Prerogative Court the tendency was to "follow the foreign grant where it could be done, but there was "a reluctance to lay down any absolute rule in the matter, whilst "the decisions in the Court of Probate . . . have militated against "the rule of following the foreign grant"; and he expressed his opinion that the court ought to act upon section 73 and make the grant in all such cases to the person who has been clothed by the court of the country of domicile with the power and duty

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¹⁸ L.R. 1 P. & M. 450.

¹⁹ Ibid. 451.

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of administering the estate, no matter who he is or on what grounds he has been clothed with that power. Following that case, Sir Francis Jeune P. in *In the Goods of Briesemann* said ²⁰ : “ The principle on which grants should be made by the courts of “ this country in respect of persons domiciled in foreign countries “ appears to me to be settled by the case of *In the Goods of “ Earl*.²¹ That principle I take to be, that regard should be had “ to the law of the domicile, in order to determine what power “ or authority has been vested in any one with regard to dealing “ with the estate, and then to give such a grant to such person “ as will enable him to perform in this country the duties imposed “ on him.” Another decision to the same effect is *In the Estate of Humphries*,²² though curiously enough this case is cited in certain textbooks as an authority for the proposition that it is optional whether to apply for the grant according to English law or to the law of the domicile. The point of *In the Estate of Humphries* ²² is that on an application for a grant of letters of administration to the attorneys of a daughter of the deceased, who had been appointed administratrix under the law of his foreign domicile, the registrar refused to make the order on the ground that the practice of the registry required that the daughter should take the grant by her attorneys in that character, according to English law, and not as the person entrusted by the law of the domicile with the administration of the estate. The object of the motion was to obtain the grant to the attorneys of the foreign administratrix as such, regardless of any title she might have in English law as next-of-kin. Having been referred to what was said by Lord Penzance in *In the Goods of Earl*,²³ Bateson J. made an order in the terms of the motion.

Against this uniform current of authority reliance was placed on certain observations of Kay J. in *Duncan v. Lawson*,²⁴ which, in relation to leaseholds in England belonging to a domiciled Scotsman, suggested that the administrator would be appointed according to English law. But, as appears from the judge’s reasoning,²⁵ the point of the decision was that owing to the natural immobility of leaseholds as distinct from movables properly so called, the accidental situs of which is disregarded, their devolution must follow the law of their situation and not that of the person. See also *Pepin v. Bruyère*.²⁶ In my opinion Mr. Russell

²⁰ [1894] P. 260, 261.²¹ L.R. 1 P. & M. 450.²² [1934] P. 78.²³ L.R. 1 P. & M. 450.²⁴ 41 Ch.D. 394, 397.²⁵ Ibid. 398.²⁶ [1902] 1 Ch. 24.

was right in submitting that the practice laid down in the "procedure direction" is fully supported by the authorities.

But it is argued that most of the cases depend on the fact that administration had already been granted to the applicant by the court of the domicile, and that there is no ground for extending this to cases in which the applicant is not actually clothed with the authority of the foreign court, even though he is entitled by the law of the domicile to the administration. The point of these decisions is that the English law is irrelevant and that what matters is the law of the domicile. There is, therefore, in my opinion no ground for drawing this distinction.

The argument was pressed that the procedure direction is couched in language which fetters the discretion of the court. If so, I am sure that it was unintentional. To avoid any such implication, and bearing in mind that in *In the Goods of Earl*²⁷ Lord Penzance laid it down that the court should make a grant under the section to the person who has been clothed by the court of the country of domicile with the power and duty of administering the estate, I would prefer to re-state the practice as follows: Whether the applicant is a person who has been entrusted with the administration by a court of foreign domicile, or is merely entitled by the law of the domicile to administer, although no such grant has been obtained, it is perfectly correct that the grant should be made as a "section grant"; but in my opinion it is desirable that it should appear on the face of the grant in which of these capacities he is being given the grant.

There remains the question, what should be done in this particular case. I am invited to depart from the practice of which I am approving because of the smallness of the estate. I do not think that that by itself is a sufficient reason for a special order, and it would obviously introduce difficulties of administration in the registry were it held to be so. But I think that this is an exceptional case. The deceased died in 1943 in a concentration camp in Poland, whither, I understand, he had been deported when Holland was overrun. His daughter, Martha Sara Levy, was the only person entitled by Dutch law to his estate, but she died without having taken administration upon herself. On June 8, 1951, the applicant was granted letters of administration to her small estate by the Principal Probate Registry. Even if that grant was not in conformity with what I think is the correct practice, it seems to me that it is manifestly convenient that,

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having obtained that grant, the applicant should administer the deceased's estate also. Accordingly I am prepared to make an order in his favour under the section.

Order accordingly.

Solicitors: *Hardman, Phillips & Mann; Treasury Solicitor.*

J. B. G.

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Mar. 6, 10.

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Legal Aid—Costs—Taxation as between solicitor and client—Principles applicable—Legal Aid and Advice Act, 1949 (12 & 13 Geo. 6, c. 51), Sch. III, s. 4—R.S.C., Ord. 65, r. 27 (29).

On taxation as between solicitor and client when costs come out of a common fund a more generous allowance is permissible than on a taxation as between party and party; and that generosity can extend not only to increasing the amounts of items but also to allowing additional items beyond those which would be allowed on a taxation as between party and party.

Where a taxation has been ordered under the provisions of the Legal Aid and Advice Act, 1949, the taxing master (or registrar) should adopt the following principles:—

(1) He should adopt as his normal standard the direction in R.S.C., Ord. 65, r. 27 (29).

(2) At the same time he should make more generous allowances than he would on a taxation as between party and party. In making more generous allowances the taxing master is permitted not only to allow items which can be properly included in a party and party taxation at a higher figure but also to allow additional items which would not be allowed on a taxation as between party and party. He has, however, a very wide discretion.

(3) The order cannot be construed as an order for taxation as between solicitor and own client.

On a summons to review a taxation made by a registrar of the solicitor and client costs of a legally assisted petitioner for divorce:—

Held (inter alia) (1) that negotiations between solicitors with reference to the interim custody or access to a child of the marriage, or to the maintenance of that child pending the hearing, were allowable on a party and party taxation and in consequence allowable on a solicitor and client taxation;

(2) That the charges for letters from the petitioner's solicitors to the respondent's solicitors enclosing a sum of money on account of maintenance for a child were permitted items as to which the registrar should exercise his discretion, according to the circumstances, whether such items were or were not justified;

(3) That the fee allowed for instructions for brief was one which should be considered upon the basis of a solicitor and client, and not a party and party basis;

(4) That since on every petition for divorce the petitioner is a necessary witness (unless his evidence is given on affidavit) it is normally permissible to allow a fee for the petitioner's attendance in court and expenses (*Harbin v. Gordon* [1914] 2 K.B. 577 followed). But in such cases a registrar might properly require, if he thinks fit, the production of some voucher to show that the amount has been paid to the petitioner.

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— —

SUMMONS adjourned into open court.

On June 22, 1951, the husband petitioner, an assisted person, was granted a decree nisi of divorce on the ground of desertion which was made absolute on August 9, 1951. The suit was undefended. It was ordered by the decree "that the costs of the petitioner should be taxed as between solicitor and client in accordance with the Third Schedule to the Legal Aid and Advice Act, 1949."

On June 29, 1951, Mr. Registrar Pereira ordered the husband to pay certain maintenance to the wife for the benefit of the infant child of the marriage, and made a similar order in respect of the taxation of the husband's costs.

The husband's solicitors lodged a bill of costs for taxation with Mr. Registrar Long, who taxed off £6 5s. 8d. from the total costs in the bill of £35 17s. 10d. After allowing for the 50 per cent. authorized increase of £14 16s. 1d., for payments of £17 13s. 6d. and taxing fee of £1 12s., the total came to £63 13s. 9d.

The items taxed off, and to which objections were taken in the general terms stated below, were as follows:—

"(1) Attending petitioner, discussing respondent's solicitors' letter. He instructed us to inform the other side that he had no objection to respondent having custody of the child, provided he had reasonable access, and to offer 10s. per week maintenance for child" (charge 6s. 8d.).

"(2) Writing respondent's solicitor in reply that the petitioner had no objection to respondent having custody . . . etc., . . ." (charge 3s. 6d.).

"(3) Writing respondent's solicitors without prejudice enclosing 10s. postal order on account of maintenance of the child" (charge 3s. 6d.).

[(4), (6), (7), (9), (10), (11), (13), (14), (16), (17), (18), id. The letter in (17) also included a postal order for £2 2s. in payment of [maintenance application] costs. The letter in (18) also

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informed the respondent's solicitors that "all future payments " would be paid direct to respondent."]

" (5) Writing petitioner informing him of the refusal to reduce " his legal aid contributions, and reporting " (charge 3s. 6d.).

[The reasons for this refusal are referred to towards the end of the judgment.]

" (8) Writing petitioner reporting case ' set down for trial. ' "

" (12) Writing respondent's solicitors informing them that the " date to be inserted in the summons for maintenance when the " payments were to be increased was January 4, 1952. Enclosing " postal order on account of maintenance of the child " (charge 3s. 6d.).

" (15) Writing petitioner informing him of result of hearing of " maintenance application and as to payment of costs."

" (19) Instructions for brief on hearing of the petition, " including attendances upon the petitioner, obtaining proof of " his evidence, and correspondence with his father, endeavouring " unsuccessfully to obtain his evidence as a witness, and with " Army Records Office as to any record of the interview which " took place between them and the respondent, and generally " preparing case for trial " (reduced from £10 10s. to £7 7s.).

" (20) Petitioner's fee for attendance in court and expenses " (charge 10s. 6d.).

The husband's solicitors filed certain objections to the taxation, and a summons was subsequently issued to show cause why the registrar's decisions should not be reversed. This summons was heard by Havers J. in open court on February 7, 1952, when his lordship directed that the papers be referred to the Queen's Proctor under section 10 (1) of the Matrimonial Causes Act, 1950, in view of the important questions raised.

The grounds of objections to items 1-19 were:—

" (1) That they [the items disallowed] were properly incurred " in connexion with the conduct of these proceedings;

" (2) That the costs are to be taxed on a solicitor and client " basis where the costs are payable out of a common fund. Mr. " Eric Sachs Q.C. in his book on Legal Aid defines the basis of " taxation at pp. 136 and 137 as follows:—' The solicitor and " client basis referred to in the third schedule of the Legal Aid " and Advice Act, 1949, is a little less stern than the party and " party basis, the total allowed being normally about 15 per " cent. higher where costs are taxed on the footing that they " are to be paid out of a common fund. This results in part

“ “through additional items being allowed and in part through
 “ “discretionary items being allowed at a higher figure.” ”

The separate objection to item (20) was as follows:

“ The disallowance of this item is objected to on the grounds
 “ that the petitioner is entitled to charge his expenses for attending
 “ court.”

The registrar's observations in respect of all the objections generally were:

“ My answer is applicable to all the objections. This is a
 “ solicitor and client bill, not a solicitor and *own* client bill. I can
 “ well understand the difficulty in which solicitors who undertake
 “ legal aid cases find themselves. They really, and perhaps not
 “ unreasonably, desire an indemnity as to costs however incurred.
 “ My own view is that the legislature should have said so had
 “ they so intended. I understand that the solicitor is not allowed
 “ to recover any sum from the client, and in many ways this
 “ seems a logical outcome for the proposal for legal aid. Now
 “ it opens a door to the abuse of a privilege not so much by
 “ the solicitor as by the client. I should be very grateful for a
 “ ruling.”

Seuffert for the petitioner. The items come under three main headings: (1) Negotiations as to interim custody and the letters enclosing maintenance; (2) instructions for brief; (3) attendance in court and expenses of petitioner. [He referred to section 6 (4), section 2 (2) (b) and section 1 (7) (b) of the Legal Aid and Advice Act, 1949.] The effect of section 2 (2) (b) is that a solicitor acting for a legally assisted person can only recover those costs which are allowed him on taxation; and it is submitted that his position is analogous to that of a solicitor acting for a widow or infant in a case where R.S.C. Ord. 22, r. 14 (11) applies. The decision in *Goodwin and Another v. Storrar*¹ should therefore be applicable to cases where legal aid has been provided rather than that in *Giles v. Randall*,² which was distinguished by Denning J.

[HAVERS J. The wording of Sch. III to the Act, however, is that of the second mode of taxation in *Giles v. Randall*,³ and it is my function to interpret the statute.]

But where expenses have been honestly incurred the taxing master should allow them: *In re Lavey; Ex parte Cohen and Cohen*.⁴

¹ [1947] K.B. 457.

² [1915] 1 K.B. 290.

³ *Ibid.* 295.

⁴ [1921] 1 K.B. 344.

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[HAVERS J. But a taxing master could not be bound because a solicitor had been authorized by his client to incur expenses.]

The costs of the negotiations for interim custody and the letters enclosing maintenance were properly incurred in view of the pending suit. Such costs would, it is submitted, be allowed against a co-respondent: see *Fenston v. Fenston*.⁵

Although I accept that "as a general rule the court will not "interfere with the decision of the taxing registrar upon a mere "question of quantum" (*In the Estate of Ogilvie; Ogilvie v. Massey*⁶) the illiberality of the taxation raises a question of principle. A more generous figure should be allowed in a solicitor and client taxation, but the fee allowed on the brief was on a party and party basis: see *Reed v. Gray*.⁷ That case is authority for the proposition that there is no justification for disallowing his fee because a witness does not carry on a gainful occupation. The circumstances of the petitioner's employment are immaterial, and his fee should be allowed.

Colin Duncan for the Queen's Proctor. There is no difference in principle on a taxation where the litigant is an assisted person, and the fact that public funds are involved is irrelevant. The taxation should be "according to the ordinary rules . . ." ⁸ and the provisions of R.S.C., Ord. 65, apply in general to the taxation of costs in matrimonial proceedings: Matrimonial Causes Rules, 1950, r. 66 (3). [He referred to Butterworth's Costs, at pp. 999 and 1651 et seq.]

There are six classes of taxation: (1) As between solicitor and own client; (2) as between solicitor and client where the costs are payable out of a fund wholly owned by the party; (3) a solicitor and client taxation under R.S.C., Ord. 22, r. 14 (11); (4) a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested; and (5) out of a fund in which the party has no interest; (6) a taxation where costs are as between party and party.

Before 1873 the common law courts had no power to award other than party and party costs. This right is still challenged. [He referred to the Annual Practice, 1951, at p. 1498, and to the Yearly Practice, 1939, at p. 1382.] The courts of equity, however, were not so restricted. [He referred to *Andrews v. Barnes*.⁹] But for the express terms of Sch. III it is doubtful whether costs under legal aid could have been on other

⁵ [1946] P. 70.

⁶ [1910] P. 243.

⁷ [1952] Ch. 337.

⁸ Legal Aid and Advice Act, 1949, Sch. 3, s. 4 (1).

⁹ (1888) 39 Ch.D. 133, 138.

than a party and party basis. The practice in the Divorce Division was to award costs on a party and party basis, although a more liberal interpretation was given. [He referred to *Allen v. Allen and D'Arcy*,¹⁰ *Ottaway v. Hamilton*.¹¹] The provisions of R.S.C., Ord. 65, are now, however, made applicable, and taxation must be subject to rule 27 (29) of that order.

[The argument then dealt with the six classes of taxation already given. The nature of the submissions, and the cases cited, are given in the judgment.]

Applying these principles of making a more generous allowance to the items in this case, it is submitted that items (1) and (2) are *prima facie* allowable; the items concerning letters enclosing maintenance are probably allowable provided that the court is satisfied that it was a proper case for the maintenance to be paid by solicitors; item (5) should be disallowed, since the local committee cannot alter the amount of contributions; items (8), (15) and (17) are allowable. [He referred to *Butterworth's Costs*, at p. 1672, in respect of items (15) and (17).] Although the court is reluctant to interfere with questions of quantum, the registrar appears to have acted on a wrong principle when taxing the instructions for brief. [He referred to *Harbin v. Gordon*¹² in respect of item (20).]

Seuffert in reply.

Cur. adv. vult.

March 10. **HAVERS J.** This is a summons by the petitioner in a suit for divorce to show cause why the decision of Mr. Registrar Long on the objections to his taxation of the petitioner's bill of costs should not be reversed. Though the summons is in the name of the petitioner, the petitioner, who was an assisted person under the Legal Aid and Advice Act, 1949, was not financially interested in the result. The persons who were in fact really interested were the solicitors who had acted for him under the provisions of the Legal Aid and Advice Act, 1949.

I adjourned this summons into open court because it raised questions of general interest to solicitors who act for assisted persons under the provisions of the Legal Aid and Advice Act, 1949. As there was nobody concerned to put before me any argument on the other side, I thought it right to direct that the papers in the suit be sent to the Queen's Proctor so that I might have the benefit of any argument which counsel on his behalf

¹⁰ (1860) 2 Sw. & Tr. 107.

¹² [1914] 2 K.B. 577, 586.

¹¹ (1878) 3 C.P.D. 393, 402.

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thought right to present to the court. Mr. Colin Duncan was instructed on behalf of the Queen's Proctor, and I am much indebted to him for the careful, exhaustive and admirable argument which he presented to me. I should also like to thank Mr. Seuffert for the clear and admirable argument which he also presented to me on behalf of the petitioner.

The petition in this case was presented by a husband for divorce on the ground of desertion; the petitioner asked for the discretion of the court to be exercised in his favour. There was nothing unusual or abnormal about the petition, which was of a common type of which many thousands are heard in this Division during the course of a year. It was heard on June 22, 1951, and a decree nisi was granted. The decree nisi contained a direction that the costs of the petitioner be taxed as between solicitor and client in accordance with the provisions of Sch. III to the Legal Aid and Advice Act, 1949.

The petitioner had obtained a certificate under the provisions of the Legal Aid and Advice Act, 1949, entitling him to prosecute a suit for divorce and to enforce any order for costs. The certificate stated that the National Assistance Board had determined the assisted person's disposable income as £275, his disposable capital as nil, and his maximum contribution as £59 10s. 0d. The legal aid committee assessed his contribution as £52, payable by instalments of £1 on acceptance and a further 51 weekly payments of £1.

In due course the solicitors for the petitioner lodged a bill of costs for taxation with Mr. Registrar Long. The registrar, in his capacity as taxing master, taxed off £6 5s. 8d. from the total costs as mentioned in the bill of £35 17s. 10d. The total bill as taxed, including disbursements, was £63 13s. 9d.

The Legal Aid and Advice Act, 1949, provided that legal aid could be given in certain proceedings which were therein mentioned, and in the courts which were therein referred to. At the present time, the Act only applies to legal proceedings in the High Court. [His Lordship read section 1 (5)¹³ and (7),¹⁴

¹³ Legal Aid and Advice Act, 1949, s. 1 (5): "Legal aid shall consist of representation, on the terms provided for by this Part of this Act, by a solicitor and so far as necessary by counsel (including all such assistance as is usually given by solicitor or counsel in the steps preliminary or incidental to any

"proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings)."

¹⁴ S. 1 (7): "Save as expressly provided by this Part of this Act, or by regulations made thereunder,—(a) the fact that the services of counsel or a solicitor are

section 2 (2)¹⁵ (of which he said: "That is an important provision because if any costs are incurred which are not allowed on taxation the solicitor cannot recover them from any source at all"), section 6 (1),¹⁶ (4),¹⁷ (5),¹⁸ (6),¹⁹ and sections 1 (1), 2 (1) and 4²⁰ of Sch. III to the Act. He also read regulation

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"given by way of legal aid shall not affect the relationship between or rights of counsel, solicitor and client or any privilege arising out of such relationship; and (b) the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised."

¹⁵ S. 2 (2): "Where a person receives legal aid in connexion with any proceedings—(a) the expenses incurred in connexion with the proceedings, so far as they would ordinarily be paid in the first instance by or on behalf of the solicitor acting for him, shall be so paid except in the case of those paid direct from the legal aid fund as provided by this Part of this Act; (b) his solicitor and counsel shall not take any payment in respect of the legal aid except such payment as is directed by this Part of this Act to be made out of the legal aid fund; (c) he may be required to make a contribution to the legal aid fund in respect of the sums payable thereout on his account; (d) any sums recovered by virtue of an order or agreement for costs made in his favour with respect to the proceedings shall be paid to the legal aid fund; (e) his liability by virtue of an order for costs made against him with respect to the proceedings shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties and their conduct in connexion with the dispute."

¹⁶ S. 6 (1): "Panels of solicitors and barristers willing to act for persons receiving legal aid shall be

"prepared and maintained, and there may be separate panels for different purposes, for different courts and for different districts." (Subs. (2) provides that solicitors or barristers may have their name on the appropriate panel.)

¹⁷ S. 6 (4): "Where a person is entitled to receive legal aid, the solicitor to act for him and, if the case requires counsel, his counsel shall be selected from the appropriate panel, and he shall be entitled to make the selection himself." That is subject to certain provisos.

¹⁸ S. 6 (5): "Subject to this Part of this Act, a solicitor who has acted for a person receiving legal aid shall be paid for so acting out of the legal aid fund, and any fees paid to counsel for so acting shall also be paid out of that fund."

¹⁹ S. 6 (6): "The sums payable under the last foregoing subsection to a solicitor or counsel shall not exceed those allowed under the Third Schedule to this Act."

²⁰ Legal Aid and Advice Act, 1949, Sch. 3, s. 1 (1): "The sums allowed to counsel in connexion with proceedings in the House of Lords or the Supreme Court shall be 85 per cent. of the amount allowed on taxation of the costs: . . ."

S. 2 (1): "The sums allowed to a solicitor in connexion with proceedings in the House of Lords or the Supreme Court shall be the full amount allowed on taxation of the costs on account of disbursements and 85 per cent. of the amount so allowed on account of profit costs: . . ."

S. 4: "Subject to the last foregoing paragraph" (which is not applicable to the facts of this case) "costs shall be taxed for the purposes of this Schedule according to

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18 (3) of the Legal Aid (General) Regulations, 1950,²¹ and observed that the decree contained the appropriate direction. His Lordship continued:] Section 4 (1) is the relevant paragraph for the purposes of the question which I have to determine, and upon which I am asked to give a ruling.

Mr. Duncan submitted to me that in section 4 (1) of Sch. III to the Legal Aid and Advice Act, 1949, stress should be laid upon the words "according to the ordinary rules applicable on "a taxation as between solicitor and client." He submitted that, when the taxing master was called on to tax a bill his mind should not be coloured, in view of those words, by the fact that the litigant was an assisted person, or by the fact that the fund out of which the costs were to be paid was a fund which substantially consisted of moneys provided by Parliament. I accept that argument of Mr. Duncan, and I think it does correctly interpret the meaning of those words.

I ought to refer also to rule 66 of the Matrimonial Causes Rules, 1950, whereby: "Every bill of costs shall be referred to "a registrar for taxation and may be taxed by him or such other "taxing officer as the President may appoint." The rule then deals with the machinery for the filing of the bill and the notice to be given; and rule 66 (3) provides: "In any cause or matter "to which these rules apply the costs allowed to solicitors and "the taxation of such costs shall, except where these rules "otherwise provide, be in accordance with the provisions of "Ord. 65 of the Rules of the Supreme Court so far as the same "are applicable." The rules have not otherwise provided, so that the costs allowed to solicitors on a taxation of such costs are to be in accordance with the provisions of Ord. 65 in matrimonial suits.

Mr. Duncan submitted, therefore, that on a taxation of a bill of costs under the provisions of Sch. III to the Legal Aid

"the ordinary rules applicable on a
"taxation as between solicitor and
"client where the costs are to be paid
"out of a common fund in which the
"client and others are interested:
"Provided that no question shall be
"raised as to the propriety of any
"act for which prior approval was
"obtained as required by regula-
"tions."

²¹ The Legal Aid (General) Regulations, 1950, reg. 18 (3): "Any
"order for the payment of the costs
"of any proceedings to which an
"assisted person is a party shall in-
"clude a direction that his costs are
"(in addition to any other direction
"as to taxation contained in the
"order) to be taxed as between
"solicitor and client in accordance
"with the provisions of the Third
"Schedule to the Act."

and Advice Act, 1949, the governing regulation was Ord. 65, r. 27 (29), of the Rules of the Supreme Court.²²

Though the question which I have to determine really lies within a very short compass, Mr. Duncan was good enough to provide me with the historical background relating to orders for costs generally and to the different classifications which have grown up on taxations as between solicitor and client. In deference to his careful argument I think that I ought to make some reference to the matters to which he has called my attention. Prior to 1873, the common law courts had no power to award anything except party and party costs. Mr. Duncan referred me to the note at p. 1498 of *The Annual Practice*, 1951: "Solicitor and Client's Costs.—The High Court of Justice has, as the Court of Chancery formerly had, a general and discretionary power in matters of equitable jurisdiction to give a successful party costs as between solicitor and client; but quaere, whether the power exists in matters of common-law jurisdiction."

The case cited in that note is *Andrews v. Barnes*,²³ which shows the origin of the jurisdiction to award costs as between solicitor and client. The headnote reads: "The Court of Chancery formerly had, and the High Court of Justice now has, in matters of equitable jurisdiction, a general discretionary power to give costs as between solicitor and client. Whether the High Court has the same power in matters of common law jurisdiction quaere." Fry L.J., who delivered the judgment of the Court of Appeal, examined in his judgment the old jurisdiction of the Lord Chancellor. He said²⁴: "The jurisdiction of the Lord Chancellor in costs was essentially different from that at common law. 'The giving of costs in equity,' said Lord Hardwicke in *Jones v. Coxeter*,²⁵ 'is entirely discretionary, and is not at all conformable to the rule at law.' 'Courts of Equity,' said the same great judge in another case, 'have in all cases done it' (i.e., dealt with costs), 'not from

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²² R.S.C., Ord. 65, r. 27 (29):
 "On every taxation the taxing
 master shall allow all such costs,
 charges and expenses, as shall
 appear to him to have been neces-
 sary or proper for the attainment
 of justice or for the defending the
 rights of any party, but save as
 against the party who incurred the
 same no costs shall be allowed
 which appear to the taxing master

"to have been incurred or increased
 through over-caution, negligence or
 mistake or by payment of special
 fees to counsel or special charges
 or expenses to witnesses or other
 persons, or by other unusual
 expenses."

²³ 39 Ch.D. 133.

²⁴ *Ibid.* 138.

²⁵ (1742) 2 Atk. 400.

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“ ‘any authority’ (i.e., as we understand, from any statutory or delegated authority), ‘but from conscience and arbitrio boni viri, as to the satisfaction on one side or other on account of ‘vexation.’ ” Fry L.J. then makes an examination of the older general orders of the court and shows the various phrases which have been used in reference to costs. He said ²⁶: “The general jurisdiction of the Court of Chancery in this respect is stated with great clearness by the Lords Justices in the case of *Mordue v. Palmer*.²⁷ In the course of a Chancery suit a reference was made to arbitration, which ordered that the costs should be in the discretion of the arbitrator. He awarded them as between solicitor and client, and the Court of Appeal held that as the reference was in Chancery the arbitrator had power so to do. ‘The Common Law Courts,’ said Mellish L.J.,²⁸ ‘have no power to give costs between solicitor and client, and therefore, when there is a reference, the arbitrator cannot give any other than costs between party and party. But it is otherwise with Courts of Equity; and I therefore think that, when a reference as to costs is made by a Court of Equity, the court gives the arbitrator jurisdiction to award costs as between solicitor and client if he shall think fit.’ ”

The practice in this Division has been to award costs as between party and party only. I was referred to *Allen v. Allen and D'Arcy*.²⁹ That case showed that on a taxation in this Division in a matrimonial suit as between party and party there was some difference between the taxation and that of a taxation between party and party in a common-law cause. The headnote reads: “Costs of wife in a matrimonial suit are taxed as between party and party, but not in all respects on the same principles as a taxation at common law between party and party. Thus, though certain issues may have been found against the wife, whose costs are being taxed, the expenses incurred by them will be allowed unless the registrar should think that they were wantonly and vexatiously raised. Expense of witnesses to prove the circumstances of a plea not in issue, if such circumstances have a bearing on other parts of the case in issue, may be allowed; and a reasonable amount of expense incurred in investigating and acquiring information as to the circumstances of the case should be allowed.” The Judge Ordinary said ³⁰: “This taxation must certainly be reviewed. The question of the

²⁶ 39 Ch.D. 133, 140.²⁹ 2 Sw. & Tr. 107.²⁷ (1870) L.R. 6 Ch. 22.³⁰ Ibid. 110.²⁸ Ibid. 32.

“ principle on which costs are to be taxed in matrimonial suits
 “ has not yet been settled, but I apprehend that I must adopt,
 “ as far as I can, the principles on which the ecclesiastical courts
 “ proceeded. I am informed that the principle of taxation in
 “ those courts was as between party and party; but that term
 “ had a very different construction from that put upon it in
 “ Common Law Courts, because there they only allow the costs
 “ of such issues as are found for the persons who are to receive
 “ costs. I think that the only limit which can with propriety be
 “ put upon the allowance of the costs of the different issues raised
 “ in this court is this: where the taxing officer is satisfied that an
 “ issue has been vexatiously and improperly put on the record,
 “ so as to occasion a wanton and unnecessary increase in the
 “ amount of costs, he is not to allow the costs of that issue.”

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It was also pointed out that notwithstanding that decision, a solicitor who appeared for a wife in a matrimonial suit and was awarded party and party costs might nevertheless be entitled at common law to recover extra costs incurred beyond those which were allowed on a party and party taxation. The authority for that proposition is *Ottaway v. Hamilton*.³¹ It is enough for me, I think, in this case, to read the headnote, which is in these terms: “ A solicitor employed by a wife to take proceedings
 “ against her husband to obtain a divorce on the ground of
 “ cruelty and adultery, may sue the husband for ‘extra costs,’
 “ i.e., costs reasonably incurred by him beyond the costs taxed
 “ and allowed as between party and party. His common-law
 “ right to sue the husband as for ‘necessaries’ supplied to the
 “ wife, is not to be limited to the statutable rights and remedies
 “ for costs given to the wife under the Divorce Acts.”

Whatever the position may have been in the early days, I need not trouble myself with it because, as I have said, the governing rule which applies to every taxation today is Ord. 65, r. 27 (29).³² That regulation has been the subject of judicial consideration and interpretation in the courts. I was referred to a number of authorities in which this took place. One of them was *McIver & Co. Ltd. v. Tate Steamers Ltd.*³³ That was a case in the Court of Appeal which was heard soon after the new rule (now Ord. 65, r. 27 (29)), which was introduced in 1902, came into operation. The headnote is: “ Rule 10 of the Rules of the
 “ Supreme Court, January, 1902, applies to taxation of costs

³¹ 3 C.P.D. 393.³³ [1902] 2 K.B. 184.³² See note 22, *supra*.

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“both as between party and party and as between solicitor and client.” (The question there arose whether the taxing master could under the new rule on a taxation between party and party allow certain costs in respect of the solicitor’s attendance.) The headnote continues: “In an action upon a charterparty a witness, whose evidence was essential to the plaintiffs’ case, was examined in London before the trial of the action. The plaintiffs’ solicitor from Liverpool attended at the examination for the purpose of instructing counsel. The plaintiffs having succeeded in the action, upon the taxation of costs between party and party the taxing master allowed in respect of the solicitor’s attendance as aforesaid an amount exceeding two guineas, the maximum allowance for such an attendance specified in Appendix N to Ord. 65, No. 147:—*Held*, that the taxing master had power to make the allowance which he made in the exercise of the discretion given to him by rule 10 of the Rules of the Supreme Court, January, 1902.”

Mathew L.J. said ³⁴: “But it is argued that under the rules the master had no discretion to allow these costs. According to the practice as to taxation of costs between party and party prior to the rules of January, 1902, the scale given in Appendix N was no doubt binding on the master, and this allowance could not have been made. But, on consideration of the objections to this rule, it was thought desirable to modify it to some extent, and accordingly the new rule 10 of the Rules of the Supreme Court, January, 1902, was made, by which it is provided that ‘regulation 29 of Ord. 65, rule 27, is hereby annulled and the following regulation is substituted therefor,’ ” and he then sets out the new rule. He continues ³⁵: “We are asked to construe this rule as meaning that the taxing master shall allow no costs, charges or expenses beyond those provided for by the scale given in Appendix N. The new regulation was framed with full knowledge of the terms of the old regulations and of the scale, and it cannot, I think, be doubted that it ought to be construed according to its terms, namely, as giving the master on ‘every taxation’ discretion to allow such costs, charges, and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, subject to the exceptions mentioned in the latter part of the rule. In this case there appears to be no reason for suggesting that the allowance

³⁴ [1902] 2 K.B. 184, 187.³⁵ *Ibid.* 188.

“made was not perfectly reasonable, and it comes within the plain terms of the rule. For these reasons I think the appeal must be dismissed.”

I was also referred to *In re Ermen; Tatham v. Ermen*.³⁶ That decision really followed the decision of the Court of Appeal to which I have just referred. The headnote reads: “Under rule 8 of Ord. 65, and rule 10 of January, 1902 (which is the new sub-rule (29) of rule 27 of the same order), the discretion of the taxing officer is no longer limited to the maximum fee prescribed by Appendix N; but under these regulations he has now on every taxation a two-fold discretion—first, in ordinary cases, the discretion conferred on him by Appendix N, and, in addition to that, a general discretion in special cases to allow all such costs, charges, and expenses as appear to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party. The Practice Notes of the Masters of Hilary Sittings, 1902—known as the ‘Blue Book’—though framed and issued by them under the power conferred on them by sub-rule (37) of rule 27 of Ord. 65, have no statutory authority, and do not abrogate or fetter the discretion given them by the Rules of the Supreme Court. They merely define the practice which, as a general rule, should be followed by the masters on taxations.”

In his judgment Farwell J. said³⁷: “In this case the learned registrar, after consulting the taxing masters in London, was of opinion that he had no discretion to allow more than the maximum of £1 1s. prescribed by Appendix N, No. 65, or by the Blue Book; although, if he had had such a discretion, he considered that the fee of £5 5s. claimed was proper and reasonable, and ought to be allowed. In my opinion, on the construction of the rules, apart from any question of authority, the learned registrar and the taxing masters have not taken the right view. Now Ord. 65, rule 8, is a rule of old standing, and contains negative words: ‘In causes and matters commenced after these rules come into operation, solicitors shall be entitled to charge and be allowed the fees set forth in the column headed “Lower Scale” in Appendix N in all causes and matters, and no higher fees shall be allowed in any case, except such as are by this order otherwise provided for.’ Turning on to find what are ‘otherwise provided for,’ I find a fasciculus of sub-clauses headed ‘Special allowances and

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³⁶ [1903] 2 Ch. 156.³⁷ Ibid. 160.

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“ ‘general regulations,’ 58 in number, contained in rule 27. “ ‘One of those sub-rules is No. 29. In the old rules which were “ ‘in force before January, 1902, sub-rule (29) was expressed in “ ‘the negative. There was, first, rule 8, with the negative “ ‘words: ‘No higher fees shall be allowed in any case except “ ‘such as are by this order otherwise provided for’; and then “ ‘the old sub-rule (29), which said: ‘As to costs to be paid or “ ‘borne by another party, no costs are to be allowed which do “ ‘not appear to the taxing officer to have been necessary or “ ‘proper,’ and so on. But in January of last year [1902] it “ ‘was thought fit to alter that sub-rule and to put it into an “ ‘affirmative form. I think it is fair to infer that when eminent “ ‘persons like the Rule Committee alter the phraseology of a “ ‘rule they intend to alter the substance also. When you are “ ‘dealing with a set of sub-rules under the head ‘special allow- “ ‘ances and general regulations,’ which involve or may involve “ ‘an exception to the negative words in rule 8, ‘No higher fees “ ‘shall be allowed, etc.,’ and you find only a negative sub-rule “ ‘that such and such a thing shall not be allowed, it is impos- “ ‘sible to hold (and in fact the contrary was held) that under “ ‘those regulations the maximum limit fixed in Appendix N can “ ‘be exceeded. But when those negative words in the sub-rule “ ‘are altered into the affirmative, and become an express power “ ‘or direction that ‘on every taxation the taxing master shall “ ‘allow all such costs, charges and expenses, as shall appear “ ‘to him to have been necessary or proper for the attainment “ ‘of justice,’ and so on, then, having regard to the collocation “ ‘in which you find them, it appears to me that the Rule Com- “ ‘mittee did intend to give the general discretion which the “ ‘words import.’” Farwell J. then said ³⁸ that he considered that he was bound by the decision of the Court of Appeal in *McIver & Co. Ltd. v. Tate Steamers Ltd.*³⁹

Mr. Duncan put before me a classification of the various methods of taxation of costs. His classification consisted of six different classes. His first class was a taxation as between solicitor and own client, that is to say, where the costs are payable by a client to his solicitor. His second class was a taxation as between solicitor and client where the costs are payable out of a fund wholly owned by the party. His third class was a taxation as between solicitor and client under Ord. 22, rule 14 (11).⁴⁰ His fourth class was a taxation as between solicitor and

³⁸ [1903] 2 Ch. 156, 163.⁴⁰ See note 42, post.³⁹ [1902] 2 K.B. 184.

client where the costs are payable out of a common fund. His fifth class was a taxation as between solicitor and client where the costs are payable out of a fund in which the party has no interest. I think he ought to add, to complete that, "or where the costs " are payable by one party to another." The sixth class was costs party and party.

Dealing first with his first class, that is to say taxation between solicitor and own client, Mr. Duncan called my attention to an unreported case which appears in the Note to Lord Atkins' Encyclopaedia of Court Forms and Precedents in Civil Proceedings, Vol. 7 at p. 215, from which it appears that some judges, at any rate, disapprove of the phrase "solicitor and own client." The note is in these terms: "The expression 'solicitor and own " 'client costs' has been disapproved by judges. It is more " accurate to direct taxation on the footing of an indemnity." The authority cited is *Price v. Midland Cleaning Co. Ltd.*⁴¹

With regard to his second class of taxation (as between solicitor and client where the costs are payable out of a fund wholly owned by the party), Mr. Duncan said, and I think quite rightly, that there is no practical difference between classes one and two. He referred to the passage in Seton's Judgments and Orders, 7th ed., at p. 244. The note is: "Where costs are directed to be taxed as " between solicitor and client, it does not necessarily mean that all " costs which the solicitor is entitled to against his client are to be " allowed, but allowance will vary according to the circumstances " of the case; regard being had to the position of the parties and " the fund out of which the costs are to be paid; and a distinction " is made: first where such costs are payable out of a fund " belonging to other parties; secondly where such costs are payable " out of a common fund in which the party has only a limited " interest; and thirdly where such costs are payable out of a " fund belonging exclusively to the party himself."

There is a passage in very similar terms in Daniell's Chancery Practice, 8th ed., Vol. 2, at p. 1078.

Both these classes are really taxation on an indemnity basis and neither has any application to this case.

Mr. Duncan's third class was taxation as between solicitor and client under Ord. 22, rule 14 (11).⁴²

⁴¹ Unreported. July 12, 1940 (writ number) [1939] P. 2701.

⁴² R.S.C., Ord. 22, rule 14 (11) ["Money recovered by or paid into "account of infant or person of un-

"sound mind"]]: "The costs of the "plaintiff or if more than one of all "the plaintiffs in any such cause or "matter or incident to the claims "therein or consequent thereon shall

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I was referred to the decision of Denning J. in *Goodwin and Another v. Storrar*.⁴³ The headnote to that case is this: "The words 'costs as between solicitor and client' in R.S.C., Ord. 22, rule 14 (11), which provides for the taxation of the costs of the plaintiff in any cause or matter, mean the costs which a client ought properly to pay to his own solicitor. Where, therefore, a consent order was made in favour of the plaintiffs in an action brought by personal representatives under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, and a provision was included that the defendant should pay to the plaintiffs' solicitors the costs of the action as between solicitor and client to be taxed:—*Held*, that the plaintiffs' solicitors were entitled to be paid such costs as were found by the taxing master to be properly payable to them by their own clients. *Giles v. Randall*⁴⁴ considered and distinguished." *Goodwin and Another v. Storrar*⁴⁵ was a case in which infants were concerned, and therefore the rule applied.

Denning J. gave the following judgment in open court⁴⁶; "The words 'taxation as between solicitor and client' have two meanings. The natural and ordinary meaning, which I will refer to as meaning A, is an inquiry as to the costs which a client ought properly to pay to his own solicitor, as distinct from 'taxation as between party and party,' which is an inquiry as to the costs which he should recover from the opposite side. The distinction is based on common sense, for if a client authorizes his solicitor to incur an unusual or unnecessary expense it is only right that he should reimburse his own solicitor for it, but it does not follow that he should be able to recover it from the opposite side. The other meaning of 'taxation as between solicitor and client,' a technical meaning, which I will refer to as meaning B, is an inquiry as to the costs to be paid to the solicitor out of a common fund in which the client and others are interested and is substantially a taxation as between party

"be taxed by the taxing master, or, if such cause or matter is proceeding in a district registry by the district registrar, as between party and party and as between solicitor and client, and the taxing master or district registrar shall certify the respective amounts of the party and party and solicitor and client costs, and the difference (if any) and the proportion of such difference (if any) payable respectively by any

"adult party to the cause or matter and by or out of the moneys of any party who is an infant or person of unsound mind, and no costs other than those so certified shall be payable to the solicitor for any plaintiff in the cause or matter."

⁴³ [1947] K.B. 457.⁴⁴ [1915] 1 K.B. 290.⁴⁵ [1947] K.B. 457.⁴⁶ *Ibid.* 458.

“ and party, but on a more generous scale. When meaning B
 “ is used, a different form of words is needed to describe an
 “ inquiry as to the costs which a client ought properly to pay to
 “ his own solicitor, and that is then described as a ‘taxation as
 “ ‘between solicitor and own client.’ ”

Denning J. continues ⁴⁷: “ In my opinion, in Ord. 22, rule
 “ 14 (11), the words are used in meaning A. The rule is designed
 “ to protect widows and children in accident cases by disentitling
 “ solicitors from deducting from the compensation a lump sum
 “ for their costs and by making their claim for costs subject to
 “ taxation, that is, to an inquiry in every case as to the costs
 “ properly payable to them. If meaning A is given, that result
 “ is achieved, but if meaning B is given, the effect of the
 “ sub-rule, especially the concluding words thereof, would be
 “ that the solicitor would be deprived of costs properly payable
 “ to him. In the present case, for instance, the plaintiffs’
 “ solicitors would have to pay the fee of £11 for the second
 “ leading counsel out of their own pockets, although the expendi-
 “ ture had been authorized by the plaintiffs and proved, in fact,
 “ greatly to the benefit of the estate and the children. I reject an
 “ interpretation which would lead to such a result. If I am
 “ right in thinking that in the sub-rule the words are used in
 “ meaning A, it shows that it is a valid meaning to be attached
 “ to them in any legal document, and this enables me to dis-
 “ tinguish *Giles v. Randall*.⁴⁸ The court in that case recognized
 “ that meaning A was the natural and ordinary meaning but felt
 “ compelled to give the words meaning B because that was the
 “ technical meaning; and in a legal document, where words have
 “ a technical meaning, it is the technical meaning which should
 “ be received. Now that a rule of the Supreme Court has been
 “ made using the words in meaning A, it follows that meaning A
 “ at the present day is not only the natural and ordinary meaning,
 “ but is also a valid technical meaning, and that there is no
 “ reason why in a legal document that meaning should not be
 “ ordinarily given. In the order as to costs in the present case,
 “ therefore, there is no reason why I should not adopt meaning
 “ A, when that appears to be the meaning intended by the parties,
 “ as I think it is. In view of this development it may be that
 “ *Giles v. Randall* ⁴⁸ would be differently decided at the present
 “ day.

“ At the instance of the parties and with their consent, I have

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⁴⁷ [1947] K.B. 458, 459.⁴⁸ [1915] 1 K.B. 290.

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“ seen the senior taxing master who tells me that the practice in cases under Ord. 22, rule 14, is to tax according to meaning A., that is, to ascertain the costs properly payable by the client to his own solicitor. In *Giles v. Randall*⁴⁸ it is to be noticed that the Court of Appeal were much influenced by the practice of the taxing office. I would hesitate long before I disturbed the present practice. I decline to do so. I hold that the taxation of this bill by the senior taxing master of this court was on the correct principles and I do not interfere with it.”

Mr. Seuffert submitted to me that the position of a solicitor who is acting for an assisted person under the Legal Aid and Advice Act, 1949, is closely analogous to that of a solicitor who is acting for a widow and infant in a case to which Ord. 22, rule 14 (11) applies. He invited me, therefore, to put on the words in Sch. III to the Legal Aid and Advice Act, 1949, an interpretation similar to that which Denning J. put on the words in Ord. 22, rule 14 (11).

I am unable to accept that argument for two reasons: first of all, this particular order has no application to the facts of this present case, and secondly, this order uses the words “ as between solicitor and client,” whereas under Sch. III to the Legal Aid and Advice Act, 1949, s. 4 (1), the words are different. They are: “ . . . according to the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested.”

However, the case is of assistance to me because Denning J. does deal with the position where there is a taxation out of a common fund in which the client and others are interested, which is the precise method of taxation referred to in the Legal Aid and Advice Act, 1949. The interpretation put by Denning J. on those words⁴⁹ is that it is substantially a taxation as between party and party but on a more generous scale.

I pass by for a moment Mr. Duncan's fourth class, because that is the one which applies to the facts of this case and to which I shall have to refer hereafter.

His fifth class was a taxation as between solicitor and client where the costs are payable out of the fund in which the party has no interest, with my suggested addition of the words “ or where the costs are payable by the party to another.” Under his fifth class my attention was called to *Giles v. Randall*.⁵⁰

⁴⁸ [1915] 1 K.B. 290.

⁵⁰ [1915] 1 K.B. 290.

⁴⁹ [1947] K.B. 457, 458.

This decision of the Court of Appeal is the leading authority upon Ord. 65, rule 27 (29).⁵¹ The headnote sets out the terms of regulation 29 and then goes on to say: "An action was settled upon the terms that judgment should be entered for the plaintiff against the defendant for a sum of money 'with costs as between solicitor and client to be taxed (if necessary).' The judgment was accordingly drawn up to that effect. The taxing master taxed the costs upon the footing that the second part of sub-rule (29) applied, and he disallowed or reduced in amount a large number of items, stating in effect that a taxation of costs as between solicitor and client, where the costs were to be paid by one party to another party, was stricter than a taxation as between solicitor and client, where the costs were to be paid by the client to his solicitor, and gave little more than a taxation as between party and party:—*Held*, that the second part of sub-rule 29, from the words 'but save as against the party who incurred the same,' applied to all taxations except a taxation as between a solicitor and his own client, and that, having regard to the above distinction in taxations as between solicitor and client, the taxing master had taxed the costs on the proper principle."

Buckley L.J. said this⁵²: "There are three modes of taxation as between solicitor and client. The first is where a client is taxing his own solicitor's bill of costs, commonly called taxation as between solicitor and own client. The second is where the costs are to be paid out of a common fund in which the client and others are interested. This case does not come within either of those two classes. The third is where the costs are payable by one party to another or out of a fund in which the party entitled to the costs has no interest. The present case falls within this last mentioned class. The plaintiff was to have her costs as between solicitor and client to be paid by the defendant. A practice has grown up, which I must say I regret, of differentiating between taxation of costs as between solicitor and client and as between solicitor and own client. In the former case the taxation is substantially a party and party taxation on a more generous scale." I call attention to those words.

He continued: "In the latter case there is an ascertainment and allowance of the charges properly payable by the client to his solicitor. That distinction is too firmly established for this

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⁵¹ See note 22, *supra*.

⁵² [1915] 1 K.B. 290, 295.

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“ court to interfere with it, though it may be a matter proper to
“ be considered by the Rule Committee. I have no doubt that
“ litigants who stipulate for and by agreement are to receive
“ costs as between solicitor and client often intend to get an
“ indemnity in respect of costs.

“ The taxing master has taxed the costs upon the footing
“ that the latter part of rule 27 (29) of Ord. 65 applies. The
“ history of that sub-rule is this. As the sub-rule stood before
“ the alteration in 1902 it was negative in form and was confined
“ to costs as between party and party. It ran thus: ‘ As to
“ ‘ costs to be paid or borne by another party, no costs are to be
“ ‘ allowed which do not appear to the taxing officer to have been
“ ‘ necessary or proper for the attainment of justice or defending
“ ‘ the rights of the party, or which appear to the taxing officer
“ ‘ to have been incurred through over-caution, negligence, or
“ ‘ mistake, or merely at the desire of the party.’ In January,
“ 1902, this sub-rule was so altered as that the first part was
“ reproduced in an affirmative instead of a negative form and
“ was made to extend to every taxation. It now runs thus: ‘ On
“ ‘ every taxation the taxing master shall allow all such costs,
“ ‘ charges, and expenses as shall appear to him to have been
“ ‘ necessary or proper for the attainment of justice or for
“ ‘ defending the rights of any party.’ So far the new sub-rule
“ was silent as to the costs dealt with in the latter part of the
“ old sub-rule, namely, costs incurred through over-caution, etc.
“ Those costs are remitted to the latter part of the new sub-rule,
“ which runs thus: ‘ But save as against the party who incurred
“ ‘ the same no costs shall be allowed which appear to the taxing
“ ‘ master to have been incurred or increased through over-
“ ‘ caution, negligence, or mistake, or by payment of special fees
“ ‘ to counsel or special charges or expenses to witnesses or other
“ ‘ persons, or by other unusual expenses.’ Here I find picked
“ up and reproduced in negative words the latter part of the old
“ sub-rule. The meaning is this. The earlier part of the new
“ sub-rule says that the taxing master shall allow a certain class
“ of costs. The latter part says that, except in one particular
“ case, certain costs which were formerly to be disallowed are
“ still to be disallowed. The excepted case is that of taxation
“ of costs as between a solicitor and his own client. This part
“ of the sub-rule in effect provides that as between solicitor and
“ own client those costs may be allowed, but that in all other
“ cases they shall not. The other cases include taxation as
“ between solicitor and client as distinguished from taxation as

“between solicitor and own client. Accordingly upon such a taxation as this the costs described in the latter part of sub-rule (29) are not to be allowed. The taxing master in this case has proceeded upon that footing. He says that ‘the taxation in the case of No. 3, which is the one that applies to this action, is the strictest and in effect gives little more than a taxation as between party and party, except that any necessary letters to and attendances on the client are allowed.’ That is not very well expressed. ‘Necessary letters to and attendances on the client’ are allowed as between party and party; the letters and attendances there referred to must be letters and attendances beyond those that would be allowed as between party and party. The taxing master has taxed this bill of costs on the footing that the latter part of sub-rule (29) applies. For the reasons I have given I think that he was right. Except upon a taxation as between solicitor and own client such costs as there mentioned are not to be allowed. That is the only question of principle argued before us. This court does not interfere on questions of quantum.”

Pickford L.J. delivered judgment to the same effect.

The first thing to be observed is that Buckley L.J. there set out that there were three modes of taxation as between solicitor and client, and he described each of those modes. He obviously recognizes and approves those three modes of taxation. I have no doubt that when the draftsman of the Legal Aid and Advice Act, 1949, drafted section 4 of Sch. III, he must have been well aware of these three modes of taxation, well aware that they were recognized by the courts and had been approved by the Court of Appeal in *Giles v. Randall*.⁵³ That case decided that on a taxation as between solicitor and client Ord. 65, rule 27 (29), applied to every taxation, and, except in one case, the latter part of the regulation also applied, the exception being in a case where the taxation was between solicitor and own client. But it is to be observed that Buckley L.J. referred to the observations of the taxing master dealing with necessary letters to and attendance on the client. He did indicate that on a taxation as between solicitor and client there may be other items allowable which would not be allowable on a taxation as between party and party.

The other matter of importance from the point of view of the question which I have to determine is contained in the words

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⁵³ [1915] 1 K.B. 290.

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of Buckley L.J. where he regrets the practice of differentiation between taxation of costs as between solicitor and client and as between solicitor and own client, and goes on to say: "In the former case the taxation is substantially a party and party taxation on a more generous scale." There he uses language which was precisely similar to that used by Denning J. in 1947 in *Goodwin and Another v. Storrar*.⁵⁴

I was also referred to *Frankenburg v. Famous Lasky Film Service Ltd.*⁵⁵ The material passage which was cited to me was a passage from the judgment of Lord Hanworth M.R.⁵⁶: "It appears to me that that case (*Société Anonyme Pêcheries Ostendaises v. Merchants' Marine Insurance Co.*)⁵⁷ is abundant authority for allowing, as the registrar has allowed, these costs before action. It is to be observed that in the *Pêcheries Ostendaises* case⁵⁷ the plaintiff's bill of costs which were to be paid was taxed on the basis of party and party, and that in the present case the costs are to be taxed on the basis of solicitor and client, but the difference between party and party and solicitor and client costs is undoubtedly this, that the solicitor and client costs are intended to embrace a more generous allowance for the actual costs which have been incurred by the plaintiff. It appears to us, therefore, that these costs incurred before action are costs which may be fairly attributable to the conduct of the defendants and thus within the costs which it was contemplated would have to be paid by the defendants."

The sixth class to which Mr. Duncan referred was a taxation as between party and party, and he cited *Société Anonyme Pêcheries Ostendaises v. Merchants' Marine Insurance Co.*⁵⁷ There is a passage in the judgment of Atkin L.J. in which he says⁵⁸: "The other matter that arises is as to the costs incurred before the action was commenced. That has nothing to do with the stay of proceedings, but it is a pure question whether or not the costs incurred before the writ was issued are costs which the plaintiffs can recover under an order for the costs of the action. Upon that question it appears to me to be very important to bear in mind that the taxing masters have got to apply the words of Ord. 65, rule 27 (29).⁵⁹ That rule is the guiding rule in the taxation of costs. It is intended to sum up generally the principles upon which costs are awarded; and I cannot help thinking that if that rule were really rigorously

⁵⁴ [1947] K.B. 457, 458.

⁵⁵ [1931] 1 Ch. 428.

⁵⁶ Ibid. 436.

⁵⁷ [1928] 1 K.B. 750.

⁵⁸ Ibid. 762.

⁵⁹ See note 22, supra.

“applied by everybody—and by ‘rigorously applied’ I mean
 “applied in all cases and giving full effect to the width of its
 “language—there would be many fewer complaints by successful
 “litigants than there are at the present moment. It is a rule
 “which is intended to give to the successful litigant a full
 “indemnity for all costs reasonably incurred by him in relation
 “to the action. It says in terms that the taxing master is to
 “allow ‘all such costs, charges and expenses, as shall appear
 “‘to him to have been necessary or proper for the attainment
 “‘of justice.’ That is the whole principle that the taxing
 “master has got to apply.”

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I come now to class four in Mr. Duncan’s classification, which is a taxation as between solicitor and client where costs are payable out of a common fund and which is the basis provided in section 4 of Sch. III to the Legal Aid and Advice Act, 1949.

I was referred to two cases dealing with this classification. The first was *In re Joint Stock Trust and Finance Corporation Ltd.*⁶⁰ The object of citing this report was to show that there was authority for the proposition that on a taxation as between solicitor and client where the costs were payable out of a common fund, the taxing master could properly allow items which would not be allowable on a taxation as between party and party. The headnote to that case reads as follows: “Costs—Taxation—
 “Solicitor and client—Costs payable out of common fund—
 “Transcript of shorthand writer’s notes of misfeasance proceed-
 “ings—Costs incurred through over-caution . . . or other
 “unusual expenses—Ord. 65, rule 27 (29). Summons to review
 “taken out by the applicant in certain misfeasance proceedings
 “in which judgment was given by Eady J. on February 1, 1912.
 “At that time the judgment was irrecoverable, but in the year
 “1921, after leave had been given to proceed on the judgment,
 “and a subsequent summons issued to compromise, a sum of
 “£25,000 became divisible amongst the debenture holders of
 “the Selected Gold Mines of Australia Ltd. Party and party
 “costs of the compromise were taxed and paid. In these costs
 “a transcript of the whole of the misfeasance proceedings was
 “included, but disallowed. Subsequently the applicant, who
 “was also the applicant on the misfeasance and the compromise
 “summons, brought in a solicitor and client bill of costs payable
 “out of the fund as directed by the order sanctioning the com-
 “promise. The taxing master disallowed these costs on the

⁶⁰ (1927) 137 L.T. 630.

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“ground that the same were incurred through over-caution:—
 “*Held*, that in the circumstances the transcript was necessary
 “and the costs thereof should be allowed.”

Eve J., in his judgment, said⁶¹: “I think the objection
 “ought to be allowed. It is no reflection on the taxing master
 “that he should have construed the language of P. O. Lawrence
 “J. as he has done. He regards the matter as concluded by
 “what the learned judge said. I do not think it is. The
 “applicant incurred these costs for the benefit of a body of
 “debenture holders of whom she was one, and I regard the
 “learned judge’s statement as a reservation in her favour.
 “Undoubtedly there were grounds for treating the matter as
 “concluded, but, on the other hand, the language of the learned
 “judge implies some reservation, and the only point to which
 “it could relate was the point whether as between solicitor and
 “client this item, disallowed as between party and party, could
 “be allowed. These transcripts were made for the benefit of all
 “the parties concerned in obtaining payment of the fund now in
 “court, and, in my opinion, were useful, if not absolutely
 “necessary to that end. I think, therefore, the item—not a
 “very serious one in amount—ought to be allowed in the
 “applicant’s costs.”

The other authority to which I was referred was the recent
 decision of Roxburgh J. in *Reed v. Gray*.⁶² It is a case which
 is of great assistance to me in deciding the question which I
 have to decide. The headnote quotes Ord. 65, rule 27 (29), and
 continues: “The duty of a taxing master is to approach both
 “party and party and solicitor and client taxation with his mind
 “on sub-rule (29), which is his proper norm or standard; but,
 “at the same time, he is to make more generous allowances in
 “taxing as between solicitor and client because, though the sub-
 “rule prevents him from fully achieving the intention to allow
 “all that a solicitor can properly claim against a client, it is his
 “duty to carry out that intention as far as permissible.

“*Andrews v. Barnes*,⁶³ *Giles v. Randall*,⁶⁴ *Frankenburg v.*
 “*Famous Lasky Film Service Ltd.*,⁶⁵ and *Goodwin v. Storrar*⁶⁶
 “considered.

“A country solicitor litigant who is acting for himself in a
 “London case is not prevented by law from consulting or from

⁶¹ 137 L.T. 630, 631.

⁶² [1952] Ch. 337.

⁶³ 39 Ch.D. 133.

⁶⁴ [1915] 1 K.B. 290.

⁶⁵ [1931] 1 Ch. 428, 436.

⁶⁶ [1947] K.B. 457.

"instructing or from attending on his London agent and being allowed the costs of so doing.

"*London Scottish Benefit Society v. Chorley*⁶⁷ considered and distinguished.

"On taxation, a female witness who has been taken away from her domestic duties is entitled to a proper witness fee, and there is no justification for disallowing any fee, or anything but a nominal fee, merely because she does not carry on a gainful occupation separate from her husband."

After dealing with the facts of the case, Roxburgh J. said⁶⁸: "Having regard to all the circumstances, I thought that, in the exercise of the discretion which I considered myself to have on the authority of *Andrews v. Barnes*,⁶⁹ I ought to award the plaintiff costs as between solicitor and client, and accordingly I made on November 16, 1950, an order that there be referred to the taxing master to tax as between solicitor and client the costs of the plaintiff of this action other than certain costs to which I need not further refer.

"What is the true construction of that order? On this point *Giles v. Randall*⁷⁰ is the leading case and Ord. 65, rule 27 (29)⁷¹ the relevant sub-rule." He then cites the sub-rule, and continues: "In *Giles v. Randall*⁷² the facts are as follows: "The plaintiff brought an action against the defendant to recover damages for breach of promise of marriage. When the case was in the day's list for hearing terms were agreed and indorsed on counsel's briefs "that judgment should be entered for the plaintiff for £500 with costs as between solicitor and client to be taxed (if necessary)," and accordingly the judgment as drawn up stated that "it is adjudged that the plaintiff recover against the defendant £500 and costs as between solicitor and client to be taxed (if necessary)." The plaintiff's bill of costs was accordingly taxed, and the taxing master disallowed or reduced in amount a large number of items therein, such as the charges for instructions for briefs and counsel's fees. The plaintiff carried in objections to the disallowances before the taxing master, which, so far as material, were as follows: "The plaintiff objects generally to the taxation and to the disallowance of the items herein-after mentioned on the grounds: (1) Such taxation was conducted upon the basis of a party and party taxation. It

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⁶⁷ (1884) 13 Q.B.D. 872.⁶⁸ [1952] Ch. 337, 343.⁶⁹ 39 Ch.D. 133.⁷⁰ [1915] 1 K.B. 290.⁷¹ See note 22, *supra*.⁷² [1915] 1 K.B. 290.

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“ “ “ ought to have been conducted upon the basis of a taxation
 “ “ “ as between solicitor and client where the costs are to be
 “ “ “ paid by the client, because the terms of the settlement of the
 “ “ “ action were that the plaintiff was to receive £500 damages
 “ “ “ clear, and all the costs for which she was liable to her
 “ “ “ solicitor were to be paid by the defendant.” The taxing
 “ “ “ master in his answer thereto (so far as material) said: “ It
 “ “ “ is well settled that there are various forms of taxation as
 “ “ “ between solicitor and client. No. 1. Where the costs are
 “ “ “ payable by the client to his solicitor or where the costs are
 “ “ “ payable out of a fund belonging entirely to the party. No. 2.
 “ “ “ Where the costs are payable out of a general or common
 “ “ “ fund. No. 3. Where the costs are payable out of a fund
 “ “ “ which belongs to other parties and in which the party has
 “ “ “ no interest or where the costs are payable by one party to
 “ “ “ another. The taxation in the case of No. 3, which is the
 “ “ “ one that applies to this action, is the strictest and in effect
 “ “ “ gives little more than a taxation as between party and party,
 “ “ “ except that any necessary letters to and attendances on the
 “ “ “ client are allowed.” ”

“ Those words, which are derived from the taxing master’s
 “ answers to objections and not from any judgment of any
 “ member of the court, are the linch-pin of the case which I am
 “ now trying and it is to be observed that they do not purport
 “ to set out a norm or standard for a taxation, but to state in
 “ summary form the result of a taxation on what the taxing
 “ master calls a No. 3 basis. I desire to stress that. I cannot
 “ believe that the taxing master in that case was ignorant of
 “ sub-rule (29), or failed to realize that that was the sub-rule
 “ which supplied the norm or standard for taxations as between
 “ solicitor and client. I think he was merely stating what in his
 “ experience was the general effect of a taxation so conducted.
 “ It is to be noted that he used the words ‘ in effect,’ and he does
 “ not say ‘ gives no more than ’; he says ‘ gives little more than.’ ”

“ Buckley L.J. adopts the classification into three classes
 “ indicated by the taxing master. He then says ⁷³: ‘ A practice
 “ ‘ has grown up ’ ”—and Roxburgh J. then reads part of the
 “ passage that I have already referred to in *Giles v. Randall* ⁷³ [up
 “ to “ The history of the sub-rule ”], which I need not repeat again.

Roxburgh J. continues ⁷⁴: “ [That passage] reinforces my
 “ conclusion that the taxing master knew perfectly well that it

⁷³ [1915] 1 K.B. 290, 295. See ⁷⁴ [1952] Ch. 337, 344.
 note 52, supra.

“ was that sub-rule which supplied the norm or standard for
 “ taxation and that the particular paragraph, to which I have
 “ referred, was not intended by him to be substituted for the
 “ norm or standard but was intended to state a broad summary
 “ of the results as he had experienced them.

“ Buckley L.J. then discusses the sub-rule and says ⁷⁵ ”
 [His Lordship referred to the quotation by Roxburgh J. of the
 remainder of the passage already cited, and continued to read from
 Roxburgh J.’s judgment]: “ Pickford L.J. agrees. He says that
 “ he regrets that he feels bound to affirm the decision. He says
 “ that logically costs as between solicitor and client can mean
 “ only one thing, namely, such costs as are properly chargeable
 “ between a solicitor and his client and are properly payable by
 “ the client to his solicitor, but he agrees that the sub-rule does
 “ apply to a solicitor and client taxation. He made no reference
 “ at all to the particular paragraph in the taxing master’s answers
 “ to which I have referred.

“ That case, in my judgment, decided one thing quite clearly,
 “ namely, that the latter part of the sub-rule applied to a solicitor
 “ and client taxation with the inevitable corollary that a solicitor
 “ and client taxation cannot be made identical with a solicitor
 “ and own client taxation. In my judgment, it plainly decided
 “ that; but, equally plainly, it decided nothing else.

“ Mr. Alcock [for the defendant], in an able argument,
 “ suggested that, as Buckley L.J. referred to the particular para-
 “ graph in the taxing master’s answer, and criticized it in one
 “ respect only, I ought to infer that he impliedly approved it in
 “ all other respects. First, however, I do not think that it was
 “ ever intended to be a pronouncement of a norm or standard;
 “ secondly, I do not think that Buckley L.J. did approve it in all
 “ other respects, because it is not really consistent with what he
 “ himself has said. What he said was that in the former case,
 “ that is to say, the solicitor and client taxation, the taxation is
 “ substantially a party and party taxation on a more generous
 “ scale. That must be so, because the whole of sub-rule (29)
 “ applies equally to both a party and party taxation and to a
 “ solicitor and client taxation.

“ Therefore, the characteristics of the items which can properly
 “ be allowed must be the same in both classes of taxation.
 “ Accordingly the only scope for difference is that the allowances
 “ should be on a more generous scale in one class of taxation

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“than in another. But there is, in my judgment, no ground for
 “thinking that Buckley L.J. thought that the only things that
 “could be treated more generously were certain letters and
 “attendances to the exclusion, for example, of counsel’s fees.”

After dealing with the items of counsel’s fees, Roxburgh J.
 continued ⁷⁶: “I do not think that Buckley L.J. intended, by
 “his reference to this particular passage [in the taxing master’s
 “answer] and his criticism of it in one respect only, to imply
 “that it was to be read as a limitation on the generality of his
 “own phrase, which is ‘that a solicitor and client taxation is
 “‘substantially a party and party taxation on a more generous
 “‘basis.’

“If, contrary to my view, Buckley L.J. did intend to make
 “that implication, it was plainly obiter dictum. He himself says
 “that the only point of principle decided in the case was whether
 “or not the sub-rule applied to a solicitor and client taxation.
 “This point had no relevance to the decision of that point of
 “principle and Pickford L.J. does not refer to the particular
 “passage at all. Therefore, I am not prepared to accept the
 “view that those words have been put forward, by the taxing
 “master in that case or by the court, as a norm or standard for
 “a solicitor and client taxation.

“In my judgment, the duty of a taxing master is to approach
 “both classes of taxation, both party and party and the solicitor
 “and client taxation, with his mind on the sub-rule, which is his
 “proper norm or standard; but, at the same time, he is to make
 “more generous allowances in taxing as between solicitor and
 “client because, though the sub-rule prevents him from fully
 “achieving the intention clearly expressed by the direction in
 “the order, that is to say, to allow all that a solicitor can properly
 “claim against a client, it is his duty to carry out that intention
 “so far as permissible.”

I respectfully adopt that passage in the judgment of Rox-
 burgh J. because in my view it is equally applicable to a taxation
 under section 4 of Sch. III to the Legal Aid and Advice Act,
 1949. The only distinction between that case and a taxation
 under the Legal Aid and Advice Act is that Roxburgh J. was
 dealing with case No. 3 in *Giles v. Randall*,⁷⁷ whereas the
 taxation under Sch. III to the Legal Aid and Advice Act would
 be a taxation under case No. 2 in *Giles v. Randall*⁷⁷; that is
 where costs are payable out of a common fund. For convenience,

⁷⁶ [1952] Ch. 347.⁷⁷ [1915] 1 K.B. 290.

I adopt the classification which was made in *Giles v. Randall*,⁷⁷ which was approved by the Court of Appeal. I assume that the taxing master in dealing with case No. 2 would make more generous allowance than he would in dealing with a case under No. 3. I do not profess to know the precise difference between them. I assume that it is well known to the taxing master that it would be on a more generous footing, whereas, of course, compared with No. 1, which is on an indemnity basis, a taxation on the basis of case No. 2 would obviously be less generous.

Roxburgh J. went on⁷⁸: "In his reply, Mr. Russell [for the plaintiff] referred me to a passage in *Frankenburg v. Famous Lasky Film Service Ltd.*,⁷⁹ which appears to me to embody the same principle. Lord Hanworth M.R. said: 'The difference between party and party and solicitor and client costs is undoubtedly this, that the solicitor and client costs are intended to embrace a more generous allowance for the actual costs which have been incurred by the plaintiff.'

"Mr. Russell asks me to go further and to hold that in this particular case the order should be construed as though it had directed a solicitor and own client taxation; or, in other words, an indemnity. He says that because *Andrews v. Barnes*⁸⁰ was the case on which I relied as giving me jurisdiction to make the order which I made. It is undeniably true that the judgment of the court refers to 'the right of the applicant to indemnity, the reason assigned by Kay J. for awarding them in the present case.'⁸¹ I cannot, however, accept Mr. Russell's submission. . . . In my judgment, this order is not to be construed differently from any other order for solicitor and client costs merely because I thought I found my jurisdiction to make it in *Andrews v. Barnes*."⁸² I again respectfully agree with what Roxburgh J. says there.

Roxburgh J. continues⁸³: "Mr. Russell then approached his problem on broader grounds. He said that *Goodwin v. Storrar*⁸⁴ is an authority for the proposition that an order for solicitor and client costs ought now to be construed as though it were an order for solicitor and own client costs. There is no doubt that *Goodwin v. Storrar*⁸⁴ has not previously been taken into account in carrying out taxations as between solicitor and client in the Chancery Division, and I must look at it carefully. It is a

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⁷⁷ [1915] 1 K.B. 290.⁷⁸ [1952] Ch. 343, 347.⁷⁹ [1931] 1 Ch. 428, 436.⁸⁰ 39 Ch.D. 133.⁸¹ Ibid. 140.⁸² 39 Ch.D. 133.⁸³ [1952] Ch. 337, 348.⁸⁴ [1947] K.B. 457.

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" decision of Denning J. The facts are as follows: ' The plain-
 " tiffs were personal representatives of a man and his wife who
 " were killed as a result of an explosion at a munition works,
 " and they brought an action against the defendant claiming
 " damages under the Law Reform (Miscellaneous Provisions)
 " Act, 1934, and a sum under the Fatal Accidents Act for the
 " benefit of the two children of the deceased. The action was
 " settled on the terms that £250 was to be paid in respect of
 " each of the deceased under the Law Reform (Miscellaneous
 " Provisions) Act, 1934, and £1,750 under the Fatal Accidents
 " Act. The settlement was embodied in a consent order
 " approved by the court, which contained the following provision
 " 'as to costs' "—then he sets out the provision to which I have
 already referred.⁸⁵ He continues: "' On taxation, the taxing
 " master taxed the costs on the basis that under Ord. 22, rule
 " 14 (11), the plaintiffs' solicitors were entitled to be paid such
 " costs as they would be properly entitled to receive from their
 " own clients. The defendant applied for a review.' " He
 then cites the passage which I have already read in the judgment
 of Denning J.⁸⁶

Roxburgh J. continues⁸⁷: " Ord. 22, rule 14, has no applica-
 " tion to this action, but Ord. 65, rule 27 (29), has and still
 " stands. *Giles v. Randall*⁸⁸ decided that that sub-rule applies
 " to my order, for, indeed, there is no ground of distinction known
 " to me, other than that with which I have already dealt, between
 " the order in *Giles v. Randall*⁸⁸ and the present order.

" Accordingly, my order cannot be construed as directing a
 " solicitor and own client taxation because so to construe it
 " would be to hold that the sub-rule did not apply to it. But
 " I do find in Denning J.'s decision support for what I have
 " already said about the duty of a taxing master in a solicitor and
 " client taxation."

Those are the authorities to which I have been referred. As
 I have already said, I have no doubt that when the draftsman
 came to draft section 4 of Sch. III he must, of course, have
 been well aware of R.S.C., Ord. 65, rule 27 (29), and of the
 decisions of the court that that was the governing regulation
 applying to every taxation, not only as between party and party
 but also as between solicitor and client, and that the latter part
 of that sub-rule applied to taxations as between solicitor and
 client with the one exception where the taxation was as between

⁸⁵ See note 43, ante.

⁸⁶ See note 46, ante.

⁸⁷ [1952] Ch. 337, 350.

⁸⁸ [1915] 1 K.B. 290.

solicitor and own client. The draftsman must also have been well aware of the classification of the three different methods of taxation as between solicitor and client which had been discussed in *Giles v. Randall*⁸⁸ and recognized and adopted by the Court of Appeal in that case. I have no doubt that with that knowledge Parliament deliberately selected class 2 of the methods of taxation referred to in *Giles v. Randall*⁸⁸ as being the appropriate method of taxation of a bill of costs in a case where a litigant had been assisted under the Legal Aid and Advice Act, 1949.

The question, therefore, which I have to decide is the principle which the registrar ought to adopt in taxing a solicitor's bill of costs, having regard to Ord. 65, rule 27 (29)⁸⁹ and the Third Schedule to the Legal Aid and Advice Act, 1949, bearing in mind the various authorities which I have already cited.

In my view the principle which the taxing master ought to adopt is as follows: (1) Under the order for taxation it is in my view the duty of the taxing master to adopt as his normal standard the direction in Ord. 65, rule 27 (29). (2) That at the same time he should make more generous allowances than he would on a taxation as between party and party. In making more generous allowances the taxing master, in my judgment, is permitted not only to allow items which can be properly included in a party and party taxation at a higher figure but also to allow additional items which would not be allowed on a taxation as between party and party. The taxing master has, of course, a very wide discretion. (3) The order, in my judgment, cannot be construed as an order for taxation as between solicitor and own client.

I have adopted the language of Roxburgh J. in *Reed v. Gray*.⁹⁰ As I have already pointed out, it seems to me that the only difference between the two cases is that he was dealing with a taxation on a number 3 basis whereas I have to deal with a taxation on a number 2 basis.

I come now to the facts of this particular case. The solicitor for the petitioner carried in a bill of costs in which their total for items of costs was £35 17s. 10d. The amount taxed off by the registrar was £6 5s. 8d., leaving a balance of £29 12s. 2d., to which had to be added the 50 per cent. authorized increase, which amounted to £14 16s. 1d., making a total of £44 8s. 3d., to which had to be added the disbursements, £17 13s. 6d., making a total of £62 1s. 9d., which with the taxing fee of £1 12s. 0d. totalled £63 13s. 9d.

⁸⁸ [1915] 1 K.B. 290.

⁹⁰ [1952] Ch. 337.

⁸⁹ See note 22, *supra*.

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The registrar had disallowed a considerable number of items and had made reductions in others. Accordingly, objections numbering 20 to the taxation by the registrar were carried in. [His Lordship read those grounds as set out in the statement of facts in the report, and continued:]

Counsel was not able to cite any authority for the passage in Mr. Eric Sachs' book which states that the result of the taxation was normally about 15 per cent. higher where costs are taxed upon the footing that they were to be paid out of the common fund. I myself am not aware of the precise way in which the different modes of taxation are worked out, and I prefer to express no opinion about it. I read this objection to mean that the solicitor is arguing that a taxation as between solicitor and client when costs come out of a common fund is entitled to embrace a more generous allowance than on a taxation as between party and party, and that that generosity can extend not only to increasing the amounts of items but also to allowing additional items beyond those which would be allowed on a taxation as between party and party. If so, leaving out for the moment the precise percentage of increase, it seems to me to embody the true principle which I have been endeavouring to state.

The registrar made some observations. [His Lordship read those observations as set out above, and continued:] I quite agree with the registrar that this is a taxation as between solicitor and client out of the common fund and not a taxation as between solicitor and own client. However, the registrar disallowed or reduced these 20 items and it seems clear to me that he cannot have accepted the objection which was put forward on behalf of the petitioner to which I have already referred, namely, that there ought to be a more generous allowance than on a taxation as between party and party.

In my opinion the proper inference which I ought to draw is that the registrar declined to accept that basis of taxation, and it seems to me to follow that he must have adopted a standard of taxation which was less generous than that which the petitioner's solicitors were inviting him to adopt. If so, it seems to me that he failed to apply the right principle, and as his answer applied to all the objections it therefore vitiates all the items disallowed which are affected by these objections.

I have to consider now the detailed items in the bill. I am going to refer to them by the numbers in the objections. The first two items raised were negotiations between the petitioner's

solicitors and the respondent's solicitors in regard to interim custody and access to the child of the marriage and for maintenance for the child. A small charge was made in the bill for both those items and they have both been disallowed by the registrar. In my view negotiations between solicitors with reference to the interim custody or access to the child or the maintenance of the child pending the hearing of the suit fall within the class which would be allowable on a party and party taxation and, of course, would be allowable on a solicitor and client taxation. If my view is correct, a more generous allowance should be made than would be in a party and party taxation. The registrar was clearly wrong in disallowing those items.

I can deal with items 3, 4, 6, 7, 9, 10, 11, 13, 14, 16, 17 and 18 together. They all really refer to letters from the petitioner's solicitor to the respondent's solicitors enclosing a weekly sum of 10s. on account of maintenance for the child. Those items seem to me to fall within the category of permitted items as to which the registrar should exercise his discretion. In an ordinary case where a solicitor is merely acting as a post office for the purpose of sending a letter enclosing 10s. I should myself find it very difficult to see any valid ground on which such items should be justified; but there might be special cases where it could be properly held desirable or necessary that direct communication should not be made by one spouse to another, and in such cases the items might possibly be justified. These are, therefore, matters in my view which the registrar could allow in the exercise of his discretion if he thought it right to do so in the circumstances of this particular case.

There are one or two other items to which I ought to refer. Item 5 was a charge for writing the petitioner informing him of the refusal to reduce his legal aid contributions. Apparently an effort was made to persuade either the National Assistance Board or the Area Legal Aid Committee to reduce the contributions which had been fixed at the time when the certificate was granted to the petitioner. As Mr. Duncan pointed out, there is no power to do that unless under the rules there has been an alteration in the circumstances, and that did not seem to be suggested here. Unless there were an alteration in the circumstances or events had happened which would entitle the petitioner under the rules to apply for a variation of the amount of the contributions which had been fixed that item would seem to be an item which could not be justified.

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Objection No. 8—"Writing petitioner reporting case set down "for trial"—appears to me to be an item which falls within the category of a permitted item but one in which the registrar ought to exercise his discretion in every case.

It is to be observed that later on in the bill there are charges for "Attending Clerk of the Rules and fixing case for hearing"⁹¹ and then giving notice to the petitioner. No doubt the registrar would take that into account and consider whether in view of that item the other item was one which he thought that he ought or ought not to allow in the exercise of his discretion.

Item 12 is "Writing respondent's solicitors, informing them "that the date to be inserted in the summons for maintenance "when the payments were to be increased was January 4, 1952. "Enclosing 10s. P.O. on account of maintenance of the child." There also is an item which falls within the category of permitted items and one on which the registrar should exercise his discretion. This item was allowed on taxation.

Item No. 15 was "Writing petitioner informing him of result "of hearing of maintenance application and as to payment of "costs." That clearly falls within the category of permitted items.

Item 19 was instructions for brief which was reduced by the registrar from ten guineas to seven guineas. It is the practice of the court never to review a case where the only question is quantum, and that practice applies to this Division as well as to all the other Divisions of the court. Mr. Seuffert contended before me that the fee which was actually allowed was really the fee which was applicable on a party and party taxation, and that on a solicitor and client taxation a more generous figure ought to have been allowed. If that were the basis on which the registrar proceeded he was clearly wrong, and this matter could and should go back to him for reconsideration. I have, however, no material on which I can attempt to decide whether seven guineas is the usual charge for a party and party taxation. However, upon this matter I follow Roxburgh J. in *Reed v. Gray*,⁹² where he deals with the somewhat similar problems in that case. An objection was put before him that all the questions which he had to decide were questions of quantum, and the judge said⁹³: "I do not agree, the question is not the quantum, but "from what point of view the ascertainment of the quantum is "approached: if it be approached from a wrong point of view,

⁹¹ This item was allowed on taxation.

⁹² [1952] Ch. 337.

⁹³ *Ibid.* 352.

“the quantum must necessarily be vitiated.” I think that the registrar did approach these items from the wrong point of view and therefore this item, together with the others, should go back to him for reconsideration in the light of the judgment which I have delivered.

The last objection was No. 20: “Petitioner’s fee for attendance in court and expenses.” In my view that is a permissible item. I was referred by Mr. Duncan to *Harbin v. Gordon and Another*,⁹⁴ which concerned the allowance for the plaintiff’s travelling and hotel expenses. Buckley L.J. said⁹⁵: “The plaintiff, as a party litigant, was not entitled to any allowance, but as a witness he was entitled to an allowance like any other witness, and none the less because he was also a party litigant. If he had not been a party litigant, but an ordinary witness, the taxing master would have been entitled to require evidence that the amount had been paid before he included it in his allocatur for recovery from the defendant. The whole question is whether, when he is a party litigant, the taxing master is not also entitled to be satisfied that the amount has been paid or that the plaintiff knows that it is going to be recovered for him from the defendant. In my opinion he is so entitled.” In my view that is the true basis on which this point should be settled, and as in this case, and indeed on every petition for divorce, the petitioner is a necessary witness (unless the leave of the court has been obtained to give his evidence by affidavit) the item is in my view normally permissible and the registrar in his discretion should grant a proper fee in respect of it.

I have now reviewed the whole of the items, and I accordingly direct that the bill of costs be referred back to the registrar for him to reconsider in the light of my judgment. There is one small matter in regard to the petitioner’s fee for attendance in court and expenses. I think the registrar might properly require, if he thought fit to do so, that there should be some voucher produced to him at the time of taxation to show that this amount has been paid to the petitioner.

Seuffert. I now have to come back to the Third Schedule and to ask your Lordship to make an order with regard to my costs on February 7, 1952, when your Lordship directed the matter to go to the Queen’s Proctor. I ask for those costs and for the costs of the hearing to be taxed as between solicitor and

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⁹⁴ [1914] 2 K.B. 577.⁹⁵ Ibid. 586.

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client in accordance with the provisions of the Third Schedule to the Legal Aid and Advice Act, 1949, on the principles laid down by your Lordship today. I think I should add, on behalf of my instructing solicitors, the costs of lodging the objections.

HAVERS J. I think it right that the form of the order should be: "All costs from the date of filing the objections up to today "to be taxed in accordance with the provisions of the Third "Schedule to the Legal Aid and Advice Act, 1949."

Solicitors: *Pyke, Middleton & Brown; The Treasury Solicitor.*

J. B. G.

1952
May 21.

IN THE GOODS OF SWORDS, DECD.

Wallington J.

Probate—Will—Mistake—Grant of probate with words omitted.

Where there is evidence of a mistake made by a testator the court has jurisdiction to consider and decide the facts in order to determine whether the mistake of which there is evidence was made by the testator and is in fact a mistake which if not remedied would frustrate his intention. In such a case the court may order that specified words shall be omitted from, but may not direct that words may be added to, probate of a testamentary document.

PROBATE MOTION.

On the instructions of the deceased one of the clauses (clause 3) contained in the original draft of her last will was omitted from the will itself, which was duly executed in February, 1948. The will was deposited in a bank, the deceased keeping a copy of the original draft. In September, 1948, she executed a codicil to the will, making certain alterations to "clause 3," "clause 4" and "clause 5." The deceased did not withdraw the will itself from the bank, but relied upon the accuracy of the copy of the draft when she prepared the codicil. It was apparent, however, from the evidence and the nature of the bequests which she sought to amend, that in referring to clauses 3, 4 and 5 she meant to refer to the original clauses 3, 4 and 5, and not to clauses 3, 4 and 5 (clauses 4, 5 and 6 in the draft) as they appeared in the will itself.

The relevant clauses in the original draft were as follows:
"(3) I direct my executor to advise — of my decease in

“ writing. [This was the clause omitted from the will itself.]
 “ (4) [clause 3 in the will] I make the following specific bequests
 “ of personal effects free of duty:—(a) — (b) — (c) —.
 “ (5) [clause 4 in the will] I give and bequeath free of duty the
 “ amount standing to the credit of my account at the date of my
 “ death with the — Bank — at B. G. (6) [clause 5 in the
 “ will] [Bequest to residuary legatee]. (7) [clause 6 in the will]
 “ [Appointment of executors].”

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The relevant words in the codicil were: “. . . I hereby revoke
 “ clause third (sic) of my said will and testament. In addition
 “ to the specific bequests of personal effects given free of duty
 “ by sub-clause (b) of clause fourth (sic) of my said will and
 “ testament I make the following specific bequests of personal
 “ effects free of duty . . . I hereby revoke clause fifth (sic) of my
 “ said will and testament and in lieu thereof I give and bequeath
 “ free of duty the amount standing to the credit of my Number 2
 “ account at the date of my death at the — Bank to B. G.
 “ [the person named in clause 5 of the draft] And in all other
 “ respects I confirm . . . etc.”

It was stated in the case on motion: “. . . Certain words in
 “ the said codicil being (i) the words ‘ I hereby revoke clause third
 “ ‘ of my said will and testament ’ and (ii) the words ‘ I hereby
 “ ‘ revoke clause fifth of my said will and testament and in lieu
 “ ‘ thereof ’ did not form part of the true will and intention of
 “ the said testatrix.”

The court was moved “ to decree probate of the said will and
 “ codicil to be granted to the applicant [the executor] as the
 “ executor named in the said will with the omission from the said
 “ codicil of [the words referred to in the case on motion] or with
 “ such other omissions (if any) from the said codicil as the court
 “ shall think fit.”

Elphinstone for the applicant.

James Comyn for the residuary legatee.

Victor Russell for the Treasury Solicitor.

WALLINGTON J. This is an interesting case and one which is
 . not exactly similar to any of the earlier cases dealing with this
 branch of the law. In approaching a case of this kind the court
 must be careful to avoid anything which would in any way run
 counter to the intention of the testatrix.

The basic principle appears to me to be that where there is

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evidence of a mistake made by the testatrix the court has jurisdiction to consider and decide the facts in order to determine whether the mistake of which there is evidence was made by the testatrix and is in fact a mistake which if not remedied would frustrate her intention, as such intention appears from all the facts and documents before the court; and in such a case the court may order that specified words shall be omitted from, but may not direct that words may be added to, the probate of a testamentary document. In the present case the lady, having executed her will, had deposited the will, or her solicitors had deposited the will, at the bank referred to in the will, and it remained there until after her death, certainly until after the events with which I am concerned in this case.

The will was duly executed on February 24, 1948. The testatrix had in her possession a copy of a draft of her proposed will which had been sent to her by Mr. Crane, her solicitor. They differed in one important respect, namely, that clause 3 in the copy of the draft was not placed in the will. The result of its omission was to make clause 4 of the draft become clause 3 in the will; clause 5 became clause 4 and clause 6 became clause 5 in the will.

I am satisfied that at all material times, particularly in the month of September, 1948, the testatrix thought when looking at the copy draft that it was a copy of the will, and that she relied on its accuracy as such. By September 14, 1948, having looked at the copy draft of the will (which she mistakenly thought was a true copy of the will which she had executed in February, 1948), she came to the conclusion that some changes ought to be made. She did not think it necessary to look at the original will because she believed that there was no difference between that will and the copy draft which she had before her.

Acting under this mistake she desired first to delete or revoke "clause third" of the will. She thought that that clause in the will provided that notice of her death should be given in writing to the person named in the will. But as a result of instructions given to her solicitor between February 16 and 24, 1948, that clause had never been inserted in the will. The evidence leaves no doubt in my mind as to this.

The omission of the "clause third" which the testatrix mistakenly believed to be in the will had the result of transferring the next clause in the will from the fourth place to the third place. That clause (clause 4) was one containing a number of gifts of specific legacies. The fact that between February 16 and

24, 1948, the deceased had instructed her solicitor to omit the original clause 3 from the will and had not indicated any wish to omit or alter the clause giving the specific legacies, when looked at in the light of the other facts (including the copy of the draft of the will and the original and copy will to which I have referred), satisfies me that she was acting under a mistake as to "clause "third" and accordingly that, in the probate of the codicil, the words "I hereby revoke clause third of my said will and testament" should be omitted. My opinion on this part of the case is fortified by the fact that in the codicil she added specific legacies to those referred to in the will, and introduced this addition by saying "In addition to the specific bequests of "personal effects given . . . by sub-clause (b) of clause fourth of "my said will and testament." This makes it plain that the deceased, when making her codicil, mistakenly thought that the original clause 3 (notice of death clause) was in the will and that, therefore, the clause as to specific legacies would be clause 4. Further, she is accurate in her reference to "clause (b)" of the clause which deals with those legacies.

Secondly, the deceased desired to substitute a gift of her No. 2 bank account for a gift of her bank account generally. She knew that the bequest in the will would or might extend to cover any account which might exist at her bank at the time of her death, and she desired that her No. 2 account should alone pass under that gift. Accordingly, in the codicil, she purported to revoke "clause fifth of my said will and testament" and then repeated verbatim the clause relating to the bank account as it was contained in the will, merely adding "Number 2" between the word "my" and the word "account." But it is quite clear to me that she intended to revoke the clause numbered 4 in the will (the bank account clause) and not "clause fifth," for that was the clause making the gift of the residue to charity. The repetition of the amended bank account clause in the codicil would, in my view, be quite sufficient to indicate her intention as to the clause in the will which she desired to revoke. This view is fortified not merely by that fact but also because there is not the smallest evidence that she did not desire the residue to go to charity and desired to die intestate as to residue, and also because it is clear that her mistake about the original (draft) clause 3 must inevitably have caused the mistakes in the codicil which it is now sought to eliminate, as far as may be possible, from her testamentary documents.

The other bequests in the will and the gift of the residue were

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not matters with which she was concerned at the time when she desired to make a codicil. It is obvious, therefore, that looking at the document, which was not (as she thought it was), a copy of her will, she desired by codicil to deal with the two matters to which I have referred. For that purpose, in the absence of her solicitor, Mr. Crane, who made the will, she saw another solicitor, Mr. Bryan, and instructed him to prepare the codicil, and told him orally what she desired it to contain. She also handed to him an exact copy of the draft will and told him that it was a copy of her will. This was on September 17, 1948. She thus transferred to her solicitor her own mistake, and it was her mistake which caused him to prepare and complete the codicil in a form which has given rise to the motion before me.

I am satisfied, therefore, as to the fact of her mistake (and I emphasize the fact that it was her mistake and not the mistake of anyone else) and that it was her mistake which prevented her testamentary intentions being expressed and carried out as she desired them to be expressed and carried out.

The question is whether that is a matter with which the court is competent to deal, and it is also one on which a question may arise as to the desirability, though not the competence, of the court to deal with it on motion. I am assisted on that second matter by these considerations. Whatever may be the result of the submission of these two documents, the will and the codicil, to a court of construction, I have no doubt that the deletion of the words which I am asked to delete would give effect to the testatrix's intentions, and, secondly, everybody who is interested in the matter is before me; there are no outstanding interests, and there is therefore no objection to the application being by motion.

I have considered the authorities cited by Mr. Elphinstone, and also *In re Horrocks, decd.*; *Taylor v. Kershaw*,¹ cited by Mr. Comyn, and I entertain no doubt that I ought to make the order sought on this motion, for the reasons which I have broadly indicated. The principle which is applicable to these matters is clearly indicated by Sir Wilfred Greene M.R. in *In re Horrocks, decd.*; *Taylor v. Kershaw*.² He was delivering the judgment of the court; he had dealt in his judgment very exhaustively with the facts and the court had formed the clear view that the testatrix had not made any mistake, and that the solicitor who prepared the will had not made any mistake, as to the inclusion of the word

¹ [1939] P. 198.² *Ibid.* 216.

“or” instead of the word “and” between the word “charitable” and the word “benevolent”; that was the factual basis on which the case proceeded. His Lordship dealt with the case in this way: “The jurisdiction of the Court of Probate to grant probate of a will textually different to the actual document signed by the testator is a strictly limited one. If the testator himself approved the words to which he put his signature (and the presumption is that he approved them), those words must stand. If the words were selected by a draftsman to whom the testator confided the task of drafting his will, similarly the words so selected must stand, even if the testator was ignorant of the actual words used. The mistake of the testator or of the draftsman employed by him as to the legal effect of the words used is immaterial. The jurisdiction, where it exists, is admittedly confined to the exclusion of words and does not extend to the insertion of words, since the insertion of words would run counter to the provisions of the Wills Act.” I interpret this as meaning, in the case before me, that if the court added or altered words, indeed if it did anything but omit words, it would be in fact making a different will from that which the testator or testatrix had intended, or perhaps that the court would be making a will without proof that the testator or testatrix intended to make it. His Lordship continued: “These matters are elementary and there is no dispute about them. The question in the present case is whether, assuming the word ‘or’ was inserted by a typist’s error as is alleged, the court has jurisdiction to strike it out. It cannot substitute the word ‘and.’ No claim is made for the excision of the word ‘benevolent’ as well as of the word ‘or’—indeed no such claim could have been made since the word ‘benevolent’ was deliberately chosen by Mr. Houghton. Bearing all these considerations in mind, we turn to an examination of the question formulated above”; and then his Lordship in his judgment dealt with it by refusing on those principles to make the order asked for.

For the reasons which I have given I am satisfied that this is a case in which it is proper to deal with the application on motion and not to insist on putting the estate to the expense of an action. I therefore make the order in the terms of the prayer in the case on motion, excluding of course the alternative prayer.

Solicitors: *Crane & Hawkins; Clayton, Leach, Sims & Co.; Treasury Solicitor.*

J. B. G.

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May 30.

Karminski J.

CLEAVE *v.* ATTORNEY-GENERAL (HEADLEY, CHANNON
AND BARCLAYS BANK LD. INTERVENING).

Legitimacy—Costs—Costs out of trust funds—Form of order.

A judge of the Probate Division has power in a legitimacy suit to make an order for the payment of the costs of the Attorney-General and the interveners out of trust funds in which the petitioner, if successful, would have had an interest.

A petition in a legitimacy suit was dismissed, the interveners successfully contending that the petitioner was not the issue of his alleged parents. The interveners, who were the trustees of certain trust funds and as such concerned in the proceedings, asked that their costs be paid out of the corpus of the trust funds; and a similar application (which was not opposed by the trustees) was made on behalf of the Attorney-General:—

Held, that the trial judge had power to make such an order, and that in the circumstances the form of order should follow that made in *Fitzwilliam v. Attorney-General* (The Times, March 15, 1951).

SUBMISSIONS as to costs.

The petitioner alleged that he was the child of the marriage between his alleged parents, and prayed for a declaration of legitimacy. The interveners, who were the trustees of certain funds in which the petitioner, if successful, would have an interest, filed an answer denying the allegation, and alleging that he had been adopted. The Attorney-General put him to proof. The court held on the evidence that the petitioner had been adopted by his alleged mother, and dismissed his petition. Argument was directed as to costs, and, in particular, to the jurisdiction of that court to award costs to the interveners out of the trust funds. The petitioner's application for costs out of the trust funds was not persisted in, but as an assisted person he was granted an order for the taxation of his own costs as between solicitor and client.

Melford Stevenson Q.C. and *James Stirling* for the petitioner.
Colin Duncan and *H. A. Corrie* for the Attorney-General.
J. E. S. Simon Q.C. and *J. L. Arnold* for the interveners.

KARMINSKI J. expressed a doubt whether he (his Lordship) had power to make an order for costs out of the trust funds in a legitimacy petition when those funds were not directly in issue. It was submitted on behalf of the interveners (who supported a

similar application in respect of the Attorney-General's costs) that the court had such power, and the court was referred to a similar order (the parties consenting) which had been made by Pilcher J. in *Fitzwilliam v. Attorney-General*¹ on the basis that he had the necessary jurisdiction. Reference was also made to the concurrent powers of the judges of the different divisions of the High Court (whereby a judge of the Probate Division has the powers of a Chancery judge).

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Simon Q.C. Would your Lordship make the *Fitzwilliam* order which allows for taxation? I should, however, tell your Lordship that Pilcher J. in the *Fitzwilliam* case¹ stated that his order ought not to be regarded as a precedent so far as the scale of costs was concerned, although he was apparently satisfied as to jurisdiction. The words I suggest are: "Costs of interveners "of and incidental and preliminary to petition, to be taxed "as between solicitor and client on the higher scale, including "in such costs all costs properly payable by them in respect "of inquiries made, preparations for trial undertaken, and "work done in relation to the subject-matter of the petition, "notwithstanding that the determination of the petition may not "have been affected by the result of such inquiries, preparations, "or work." Up till then it follows the *Fitzwilliam* formula, and I suggest it might go on: "And including also half the costs of "taking the shorthand notes of hearing and judgment, and the "transcription thereof, and all copies supplied" [the petitioner was in part responsible for the cost of the transcripts]. "That "the costs of the Attorney-General be taxed as between party "and party." Then this is how the *Fitzwilliam* order finished: "And further order that such costs when taxed be raised, "retained and paid by the trustees out of the funds subject to "the trusts," and, in this case, "of the will of John Robert "Cleave dated October 29, 1920."

Duncan concurred with the submissions as to jurisdiction and as to the form of order. The words "by consent" were omitted in order to avoid possible difficulties in the future.

KARMINSKI J. This is clearly a case where the interveners' costs should come out of the corpus of the estate. The only matter which puzzled me was whether I had power to make the

¹ The judgment, though not the discussion as to costs, is reported in The Times, March 15, 1951.

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order. I think that is the right one to make, and encouraged by the order made in similar circumstances by Pilcher J. in the *Fitzwilliam* case, I shall make the order proposed.

Order accordingly.

Solicitors: *Neish, Howell & Haldane; Treasury Solicitor; Martineau & Reid.*

J. B. G.

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Nov. 13.

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July 29, 30.

Kariminski J.

LOWE v. LOWE.

Husband and Wife—Delay—Nature of “unreasonable delay”—Discretionary powers—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 4 (2).

Where there has been delay in the presentation of a petition for divorce the court by reason of section 4 (2) of the Matrimonial Causes Act, 1950, will inquire whether such delay was unreasonable on the one hand, or excusable on the other. Unreasonable delay means culpable delay, something which shows a petitioner to have been insensible to the loss of the respondent and to the injury done to him.

The principles of the exercise of discretionary powers which were set out in *Blunt v. Blunt* [1943] A.C. 517, 525, are of general application in matrimonial causes. In trying to maintain a balance between respect for the sanctity of marriage and the social considerations which make it undesirable in the public interest to keep a long defunct marriage alive, the court in a case of unreasonable delay will consider the strong reasons of public policy stated in *Johnson v. Johnson* [1901] P. 193, 195-6 why, if adultery is known, proceedings should be taken as soon as possible: “It is a terrible thing that people should be going about the world, neither married nor unmarried, possibly liable to contract fresh and illegal matrimony, and certainly exposed to temptation to commit adultery.”

A husband and wife separated in 1934 and shortly afterwards the wife began to live in adultery. The husband learnt of this adultery; but although he met his wife quite frequently their meetings were friendly and he did nothing to take proceedings until after the death of the man concerned in 1950, nor did he attempt to induce the wife to break off her adulterous association and return to him. He himself maintained an adulterous association between 1940 and 1945. He later met another woman whom he wished to marry and filed a petition for divorce.

Held, (1) that the husband had shown himself insensible to his position and to the loss of his wife and had been guilty of unreasonable delay; (2) that in the circumstances it would neither

be a proper nor judicial exercise of the court's discretion to grant the husband a decree.

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PETITION for divorce.

After the evidence had been heard the case was adjourned for the assistance of the Queen's Proctor upon the question of unreasonable delay.

The following statement of facts is taken from the judgment. On August 9, 1951, the petitioner, Francis George Lowe, presented a petition wherein he prayed for the dissolution of his marriage with the respondent wife on the ground of her adultery with Frank Mann. The adultery complained of was alleged to have begun about 1934 and to have continued until the death of Frank Mann, which occurred on October 5, 1950; and it was alleged that the respondent and Mann lived together and committed adultery between those dates, at an address in Brentwood in Essex. On the ground of that adultery the petitioner prayed for the dissolution of his marriage, at the same time praying the court to exercise its discretion in his favour on the ground of his own adultery.

The petitioner and respondent were married in January, 1926. They were both then young people, and they lived together, though latterly somewhat intermittently, until about the end of 1934. There was one child of the marriage, who was now about the age of 21. According to the petitioner the marriage was never happy. There were many quarrels and disputes. The petitioner attributed the unhappiness to the wife's drinking habits. The wife did not enter an appearance nor take any part in the proceedings, and she did not give evidence.

By 1933 the difficulties between the parties had come to the state when the petitioner left the respondent; he left her, according to his evidence, no less than six times in all, returning to her on all the occasions except the last one. In the result the respondent wife twice took proceedings under the Summary Jurisdiction Acts before the justices, and on two occasions, namely in October, 1933, and again in November, 1933, she obtained orders from the justices on the ground of the petitioner's desertion. There was a reconciliation at some time in 1934 which endured only for a month, and resulted in the later order on the ground of desertion being discharged on December 6, 1934, on the ground that the parties had resumed cohabitation.

At the end of 1934 the parties separated, to use a neutral term, for good, and somewhere in the spring or early summer of

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1935 the respondent went to live with Frank Mann. The fact that the wife was living with Frank Mann became very soon known to the petitioner, and thereafter he saw his wife quite frequently—they were living apparently not very far apart geographically—and on those meetings their terms were perfectly friendly. The husband's knowledge of the wife's adultery with Mann therefore dated, at the latest, from the summer or early autumn of 1935. The husband did nothing, either to bring proceedings on the ground of his wife's adultery or to get the wife to break off her adulterous association with Mann and to return to him. The reasons he gave for his apathetic action were of importance. He said that he had considerable respect for Mann's father, who was a highly respected citizen of that part of Essex; also that at that time he did not want to remarry, and that he really never worried to find out about divorce until 1950.

The petitioner was not a stupid man nor an illiterate one. He was by occupation a railway clerk, and apparently a man of normal education and intelligence. The petitioner gave evidence that after some discussion with the respondent a year or so before the petition was filed on August 9, 1951, he decided that he wanted to remarry and therefore brought the present proceedings.

From that short summary of the matter it will become apparent that the petitioner, having become aware of his wife's adultery with Mann in the summer of 1935, took no action in respect of that adultery for 16 years. The difficulties of the matter, however, did not end there. In 1940 the petitioner commenced to live as man and wife with a woman who is named in his discretion statement. That adulterous association terminated in 1945 when she parted from the petitioner and married another man, and she has been living in happy and respectable matrimony with that man ever since. But the fact remained—and it was one of considerable importance in estimating this case—that the petitioner was living in adultery himself with another woman for a period of five years. It is true that for most of that period he was serving in the army, but he made his home in London when leaves and other service circumstances permitted.

Colin Duncan for the Queen's Proctor. There are two questions to be determined:—

(1) Has there in the circumstances of the case been an undue delay?

(2) If unreasonable delay is found should the court in the exercise of its discretion grant a decree?

It is submitted that question (1) is answered by applying this test. Has the petitioner, by his delay in bringing his suit, demonstrated an indifference to the loss of his wife? Has he, in the words of Sir William Scott in *Mortimer v. Mortimer*,¹ "slumbered in sufficient comfort?"

If the court is driven to the conclusion that by his delay the petitioner has acquiesced in the wrong done to him, then the delay must be held to be unreasonable.

It is only after question (1) has been decided in the affirmative that question (2) arises. In many cases the delay is satisfactorily explained, with the result that a favourable answer to question (1) is given. Assuming, however, the delay to have been held unreasonable, the answer to question (2) will to a great extent depend on whether the petitioner is sincere, i.e., whether he seeks relief from a wrong done to him or whether he seeks to be free from his marriage for a collateral purpose, such as a desire to remarry. I can find no reported case in which a petitioner who was both acquiescent and insincere obtained a decree in the exercise of the court's discretion. If the sincerity of the petitioner is not in question, other matters material to the decision of question (2) are (a) whether the position of persons other than the petitioner has been prejudiced by the delay, and (b) whether by reason of the delay evidence on material matters is no longer available. It is only where there is no insincerity, no prejudice, no loss of material evidence, that a margin for leniency exists.

Although not a statutory bar, delay was a matter given very serious consideration in the ecclesiastical courts because of the questions of acquiescence and sincerity to which it must give rise: "The court will be inclined to infer either an insincerity "in the complaint, or an acquiescence . . . or a condonation": *Mortimer v. Mortimer*.¹ That judgment was considered and followed in *Boulting v. Boulting*,² in which emphasis was laid upon the court's insistence upon sincerity in the purpose for which a suit was instituted.³ The petition in *Matthews v. Matthews*⁴ was dismissed because it was held that the suit had been instituted not for the protection of the petitioner, but for a less legitimate object and for some collateral purpose. [He referred also to *Coode v. Coode*,⁵ where the explanation for delay had been accepted, and the respondent held not to have been prejudiced by it.]

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¹ (1820) 2 Hagg.Con. 310, 313.

² (1863-4) 3 Sw. & Tr. 329, 336.

³ Ibid. 337.

⁴ (1863) 3 Sw. & Tr. 161.

⁵ (1838) 1 Curt. 755, 763.

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A finding that the proceedings have been brought for a collateral purpose, and do not directly arise from the offence itself, is a potent reason for refusing a decree where there has been delay. This is so even though that purpose may in other ways be meritorious. "Some other purpose than that of obtaining relief" was found in *Short v. Short and Bolwell*,⁶ and the petition dismissed because of delay. In *Beauclerk v. Beauclerk*⁷ Lindley L.J.⁸ referred to the "inevitable inference" that there was "some reason in the background other than the bona fide desire to be protected," and Lopes L.J.⁹ concluded that the wife had brought her suit either "for some collateral reason . . . or because she was insensible to the wrongs. . . ."

[KARMINSKI J. The Court of Appeal in that case were trying to lay down the principles upon which the court should exercise its discretion.]

A collateral purpose was also found, and the petitions dismissed, in *Pughe v. Pughe*¹⁰ and *Pears v. Pears*.¹¹

[KARMINSKI J. I cannot help but feel a certain sympathy for the petitioner in *Pughe v. Pughe*.¹²]

The question, therefore, is: Was there a bona fide desire to be relieved of the matrimonial offence, or was there a collateral purpose?

The motive may also be considered in deciding whether the delay was or was not unreasonable. [He referred also to *Hughes v. Hughes and Williams*,¹³ *Coppinger v. Coppinger and Lutwyche*¹⁴ and *Brougham v. Brougham*.¹⁵]

[KARMINSKI J. The petitioner in *Brougham v. Brougham*¹⁵ had failed to disclose material facts.]

I must accept that the decisions in some of the cases referred to, such as *Pughe v. Pughe*¹⁶ and *Coppinger v. Coppinger and Lutwyche*,¹⁷ and others which I have not cited, might have been different today in view of the change of outlook, and that some of the appeals were dismissed because the judge had exercised his discretion. On the other hand, delay is now more likely to be unreasonable because of legal aid.

It was held in *Rickard v. Rickard and Bond*¹⁸ that delay in the section meant "culpable delay, something in the nature of

⁶ (1874) L.R. 3 P. & M. 193.

⁷ [1891] P. 189.

⁸ Ibid. 201.

⁹ Ibid. 203.

¹⁰ (1897) 13 T.L.R. 465.

¹¹ (1912) 107 L.T. 505.

¹² 13 T.L.R. 465.

¹³ (1915) 32 T.L.R. 62.

¹⁴ (1918) 34 T.L.R. 588.

¹⁵ [1895] P. 288.

¹⁶ 13 T.L.R. 465.

¹⁷ 34 T.L.R. 588.

¹⁸ (1921) 37 T.L.R. 511.

"connivance or acquiescence"—the definition given in *Tollemache v. Tollemache*¹⁹ and cited in that case. Stress must be laid on the word "culpable." See also *Binney v. Binney and Hill*.²⁰

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[KARMINSKI J. The facts of that case are very similar to those of the present one, and it will be difficult to distinguish it.]

Although the court has a discretion in cases of unreasonable delay, that discretion will be exercised, like other discretions, judicially: *Binney v. Binney and Hill*²⁰; *Greenwood v. Greenwood*.²¹

There are two classes of case where there has been delay and decrees have been granted: (1) Where the delay is held not to have been unreasonable; (2) where there has been a favourable exercise of discretion. The explanation for delay was accepted in *Pellew v. Pellew and Berkeley*,²² *Nicholson v. Nicholson*,²³ and *Johnson v. Johnson*.²⁴ The principles enunciated in the last paragraph of the first case,²⁵ and in the third case,²⁶ are, however, of general importance.

[KARMINSKI J. The amount of time must vary on the facts. *Nicholson v. Nicholson*²⁷ is not an authority for saying that two years' delay is necessarily unreasonable, although it may put the court on inquiry.]

*Newman v. Newman*²⁸ and *Stevenson v. Stevenson and Lane*²⁹ are cases where delay has been held unreasonable but a decree granted. [He referred also to *Pointon v. Pointon and Sutton*.³⁰]

It is submitted that the court must therefore consider: (1) Has there been an acquiescence amounting to culpability? (2) Have other parties been prejudiced by the delay? (3) Are there mitigating circumstances? (4) Is there insincerity? (5) What is the judicial exercise by the court of its discretionary powers?

In the present case there has been unreasonable delay, there is a suspicion of acquiescence, the reasons for taking proceedings are of a collateral nature, there is an insincerity, and it is submitted that the petition should be dismissed.

W. J. K. Millar (*Geoffrey Crispin* with him) for the petitioner. I accept the law as to unreasonable delay as submitted by the

¹⁹ (1859) 1 Sw. & Tr. 557.

²⁰ [1936] P. 178, 181.

²¹ [1937] P. 157, 164.

²² (1859) 1 Sw. & Tr. 553.

²³ (1873) L.R. 3 P. & M. 53.

²⁴ [1901] P. 193.

²⁵ 1 Sw. & Tr. 553, 555.

²⁶ [1901] P. 193, 195-6.

²⁷ L.R. 3 P. & M. 53.

²⁸ (1870) L.R. 2 P. & M. 57.

²⁹ [1947] W.N. 83.

³⁰ (1922) 38 T.L.R. 848.

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Queen's Proctor. But it is submitted that in the circumstances of the case the delay was not unreasonable. Such acquiescence as there may have been was not direct and culpable, but indirect.

There are very many cases of unreasonable delay where decrees have been granted, although they are unreported. There is, moreover, a very different approach to questions of divorce today than formerly. Would a jury today say that the petitioner here was culpable in not taking steps earlier? [He submitted that a favourable interpretation should be put on the evidence.]

It is further submitted that the principles enunciated in *Blunt v. Blunt*³¹ as to the exercise of discretion are applicable in this case. [He referred to *Jeffrey v. Jeffrey*.³²] It is in the interests of public policy that the marriage should be dissolved.

Duncan in reply. Although *Blunt v. Blunt*³³ may give a margin of leniency in a petitioner's favour, the court cannot disregard insincerity and collateral motive.

KARMINSKI J. The case came before me as an undefended case on November 13, 1951, and it then became apparent that there were grave questions of delay and that the matter would have to be investigated. I therefore asked the Queen's Proctor to assist with argument, and that has been done, and, as always happens in these cases, I have had very great assistance from Mr. Colin Duncan, who appears for the Queen's Proctor. I have also had equally great assistance from Mr. Millar, who appears for the husband petitioner.

Before I deal with the problem of delay I shall have to deal briefly with the facts, which are in a fairly small compass. [His Lordship stated the facts and continued:] I have to decide whether the petitioner has been guilty of unreasonable delay and, if my answer to that question is yes, whether it is a case in which, in the proper exercise of my discretion, I can grant him a decree.

So far as the respondent's adultery with Mann is concerned, that was proved to my satisfaction. I think it desirable to say at once that serious and prolonged though the petitioner's adultery was, it would not by itself, in the circumstances of this case, have prevented me from exercising my discretion in his favour if that were the only obstacle; but the real question in this case is the question of delay, and I must recall to myself

³¹ [1943] A.C. 517, 525.

³³ [1943] A.C. 517.

³² [1951] P. 32, 35.

the statutory duty which is imposed on the court by the Matrimonial Causes Act, 1950, re-enacting a like series of statutes, in similar terms, beginning in the year 1857. Section 4 of the Act of 1950 provides: "On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties, and also to inquire into any counter-charge which is made against the petitioner." By subsection 2: "If the court is satisfied on the evidence that the case for the petitioner has been proved . . . the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition: Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery, or if, in the opinion of the court, the petitioner has been guilty of unreasonable delay in presenting or prosecuting the petition. . . ." Then follow three other branches of the section, which in my view have no bearing on the present case.

The duty of the court to inquire into delay was made statutory by the first Divorce Act of 1857, but it is clear from a number of authorities that delay was regarded as a discretionary bar by the ecclesiastical courts in their consideration of divorce cases. I do not think that it is necessary to make a prolonged historical inquiry into the origins of the statutory position, but one authority will suffice to show the view which was taken by the ecclesiastical courts. In *Mortimer v. Mortimer*,³⁴ which was tried in February, 1820, by Sir William Scott, later Lord Stowell, the question of delay was discussed, and the principle applied by the ecclesiastical courts was summarized in two sentences from the judgment of Sir William Scott³⁵: "The first thing which the court looks to, when a charge of adultery is preferred, is the date of the charge, relatively to the date of the criminal fact charged, and known by the party; because, if the interval be very long between the date and knowledge of the fact, and the exhibition of them to this court, it will be indisposed to relieve a party, who appears to have slumbered in sufficient comfort over them; and it will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury, whether

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³⁴ 2 Hagg.Con. 310.³⁵ Ibid. 313.

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“real or supposed, or a condonation of it. It, therefore, demands
 “a full and satisfactory explanation of this delay, in order
 “to take it out of the reach of such interpretations.” That
 summarizes the view of the matter which was taken by the
 ecclesiastical predecessors of the Divorce Court.

Subsequently to the Act of 1857 the question of delay was considered in a long line of authorities, which were brought to my notice by the industry of Mr. Duncan, and to some of which only I desire to refer, because I am concerned in this case to try and ascertain on what principle the court has acted. In *Short v. Short and Bolwell*³⁶ the court had to consider the petition of a husband who discovered his wife in adultery in September, 1859, and left her, but did not present a petition on the ground of that adultery until July, 1873; that was a delay of nearly 14 years. As an excuse for or explanation of this delay the petitioner pleaded his poverty, but it became apparent that his poverty was relative, and that although not a rich man he was in a substantial way of business as a coal merchant. The Judge Ordinary, Sir James Hannen, said³⁷: “I have often expressed my surprise at finding cases brought into this court after years of delay, but, making every allowance for the position in life of the petitioner, and the other matters which have been suggested on his behalf, I cannot accept it as a sufficient reason for a delay of 14 years, that he has not had the means of taking proceedings earlier.” The Judge Ordinary then deals with the man’s financial position and sums it up in this way³⁸: “He therefore presents to the court the picture of a man who has been thoroughly prosperous in life. For 12 or 14 years he has been living in the same town with his wife and her paramour, content to push his business, and the last thing he has thought of is to obtain a divorce. He has only taken proceedings for that purpose after the woman with whom he is alleged to have been living in adultery has died. A change then comes over him in his domestic relations, and he wakes up to the expediency of obtaining a divorce. I come to the conclusion that the petitioner, all the facts being known to him, has been content to see his wife living in adultery with the co-respondent for all these years, and has now, for some other purpose than that of obtaining relief from the tie of matrimony on account of that adultery, instituted these proceedings.” And

³⁶ L.R. 3 P. & M. 193.³⁸ Ibid. 196.³⁷ Ibid. 195.

he therefore dismissed the petition. It will be noted in that case that the Judge Ordinary was emphasizing what has been sometimes called the collateral purpose, by which I mean a purpose other than that for obtaining relief from the ties of matrimony, and seeking redress for his injuries.

I now turn to *Beauclerk v. Beauclerk*,³⁹ which was heard in the Court of Appeal in 1891. In that case a wife petitioner had been guilty of many years' delay, and the explanation which she gave of her delay was that she did not wish to bring proceedings for a divorce until her son, who was, I think, the only child of the marriage, had come of full age and was able to make clear his wishes to his mother on the subject. The case came before the Court of Appeal and appears to have been very fully argued by some of the most distinguished counsel of the day; and the decision of the Court of Appeal was that the excuse offered by the petitioner was not such an excuse as to make the delay excusable. Lindley L.J. said, after discussing the reasons offered by the petitioner⁴⁰: "Can that be said to be a satisfactory reason for "not taking these steps sooner? Having regard to the fact that "there was only one child of the marriage, and that a boy, I "cannot accept it as such. It appears to me, that if we were "to allow such a reason as that as an excuse for delay, then there "is no case in which delay would not be excusable. The court "might just as well strike the sections out of the statute." And the other Lords Justices came to the same conclusion. Lopes L.J. dealt with the wife's explanation in this way⁴¹: "But the "explanation which she has given simply amounts to this—that "she hoped her husband would repent, that she was influenced "by the fact that her son, a boy, was growing up, and would "attain his majority in 1887, and that she wished to wait until "her son had grown up. It is difficult to see how that could "have influenced her in any way. If her child had been a girl, "there might have been more to have been said for it; but I "cannot see why the growing up of a boy should have been any "ground for waiting the whole of that period and delaying a "remedy to which she was entitled in 1870. At any rate, the "explanation appears to me to be inadequate. It is in the "discretion of the court to grant relief where there has been "unreasonable delay. I think in this case the court properly "exercised its discretion by refusing to grant it. Having regard

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³⁹ [1891] P. 189.⁴¹ Ibid. 202.⁴⁰ Ibid. 201.

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"to the lapse of time, it is difficult to come to any other conclusion than this: that the wife brings her suit now, either for some collateral reason, which we do not know, or because she was insensible to the wrongs she had sustained at the hands of her husband. I think, therefore, the appeal must be dismissed." That was in 1891.

In 1921 *Rickard v. Rickard and Bond* ⁴² came before the Court of Appeal on appeal from Horridge J. In that case the Court of Appeal, composed of Lord Sterndale M.R., Scrutton and Younger L.JJ., dealt with the principle. The facts of that case need not, I think, be discussed at any length because they are quite different from the present, in that the petitioner delayed with a view to preserving the title to a child of some property in which there was a possible interest, and with that in view there had been very substantial delay. The Master of the Rolls in the course of his judgment said this ⁴³: "The reason why that doctrine was established was stated by Sir Francis Jeune P. in *Johnson v. Johnson* ⁴⁴: 'I may add that the reasons why this court insists on steps being taken promptly, if they are taken at all, and why it should be very strenuous on the subject of delay, are that it is a terrible thing that people should be going about the world, neither married nor unmarried, possibly liable to contract fresh and illegal matrimony, and certainly exposed to temptation to commit adultery. That is a state of things which ought not to be prolonged for a moment longer than can be properly avoided.'" And the Master of the Rolls, applying those principles, came to the conclusion that the finding of unreasonable delay was justified, and that on that finding the case was not one in which the Court of Appeal could interfere with the discretion exercised by the trial judge. Younger L.J., agreeing with the Master of the Rolls and Scrutton L.J., said ⁴⁵: "From the point of view of the Act, however, the petitioner's delay was not meritorious at all, because by not taking proceedings for a divorce he was bringing about a continuance of the adulterous life of the respondent and co-respondent."

I come now to two cases decided in 1936 and 1937 respectively, which in my view are of great importance. The first is *Binney v. Binney and Hill*.⁴⁶ The facts of that case are worth reviewing because they bear at any rate some similarity to the facts in the case with which I am at present concerned. In *Binney v. Binney*

⁴² 37 T.L.R. 511.⁴³ Ibid.⁴⁴ [1901] P. 193, 195.⁴⁵ 37 T.L.R. 511, 512.⁴⁶ [1936] P. 178.

and Hill⁴⁶ the marriage had taken place in 1896, and about 18 years later—that is, about 1914—the parties separated, and the respondent went to live with the co-respondent, living happily with him until and after the filing of the petition⁴⁷: “The petitioner was willing to take proceedings, but the respondent and the co-respondent desired the matter to be kept quiet and no step was taken. In 1914 the petitioner himself commenced an adulterous connexion with a woman with whom he regularly cohabited till in 1923 he finally terminated the relationship, because, as he stated in evidence, the woman in question became addicted to habits of intemperance. From 1923 onwards till the filing of the petition in 1935 the petitioner still took no step to obtain a dissolution of his marriage or to enable himself to contract a second marriage.” In 1934 he met another lady, with whom he did not commit adultery but whom he wished to marry, and he therefore brought the present proceedings. The case appears to have been undefended, but the question of delay was actively canvassed, and Bucknill J. had the advantage of a very full argument from Mr. Clifford Mortimer on behalf of the petitioner. Having heard that argument, Bucknill J. said⁴⁸: “I cannot accept the excuse given by the petitioner for his delay up to 1934.” (It appears that the petitioner had expressed belief that he himself had committed adultery and therefore should not obtain any relief.) “The petitioner was an educated man and ought to have known the law. He could easily have found it out, at all events. But there is no reason to believe that up to 1934 the petitioner wanted a divorce. He then met a woman whom he now wants to marry. There is no suggestion of immorality in that. But as he now wishes to marry her he has taken the advice of his solicitor and has been told that he may get a divorce. The respondent and co-respondent also think that they may as well get married.

“The question that I have now to decide is whether in the exercise of my discretion a decree should be granted. The matter is governed by the Judicature (Consolidation) Act, 1925, s. 178 (1), which enacts that the court shall not be bound to pronounce a decree if it finds that the petitioner has been guilty during the marriage of unreasonable delay in presenting a petition. Has there been unreasonable delay? I understand the statute to mean culpable delay, something in the nature

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⁴⁶ [1936] P. 178.⁴⁸ Ibid. 180.⁴⁷ Ibid. 179.

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“ of acquiescence such as shows the petitioner to have been
 “ insensible to the loss of his wife. I assume that the purpose
 “ of the law in laying down discretionary bars to divorce like
 “ delay is to encourage lawful wedlock and to set its face against
 “ adultery. The statute accordingly makes it more difficult to
 “ obtain a divorce if the petitioner has been guilty of adultery or
 “ of culpable delay in suing for divorce. In my view the delay
 “ in this case amounts to culpable delay. In effect the petitioner
 “ has acquiesced in the adultery of his wife. He took no steps
 “ originally to free himself and to let the respondent and co-
 “ respondent contract a lawful union. Whatever my personal
 “ sympathies may be, they are not a proper ground for exercising
 “ a judicial discretion, and as I am satisfied that there has been
 “ culpable delay and real acquiescence by the petitioner in the
 “ adultery of his wife the petition must be dismissed.”

I pause there for a moment, because, as I have already said, there is considerable similarity between the facts of that case and the present one. There the petitioner had been aware of the respondent's adultery for something like 21 years before the petition was filed. Here, it is true, the period is rather more than 16 years. In *Binney v. Binney and Hill*⁴⁹ the petitioner had consoled himself over a longish period with a mistress. So had the petitioner in the present case, and a further similarity is that the petitioner desired to marry a woman who was not the woman mentioned in the discretion statement. The only difference of importance, if it is of real importance, is that in *Binney v. Binney and Hill*⁴⁹ the co-respondent and the respondent were both alive at the time of the hearing of the petition; whereas in the present case the man with whom the respondent committed adultery is dead, and therefore there is no question of their marrying.

I desire to follow implicitly the law as stated by Bucknill J. in the passage which I have read. The question which Bucknill J. put to himself was the statutory question: “Has there been “unreasonable delay?” I follow him in understanding that “unreasonable delay” means culpable delay, something in the nature of acquiescence, something which shows the husband in this case to have been insensible to the loss of his wife and the injury done to him by his wife and by the man with whom the wife was living. Having answered that question in the affirmative, Bucknill J. then proceeded to consider the principles on which discretion could be exercised, and I will deal with that later on in my judgment.

⁴⁹ [1936] P. 178.

I pass now for a moment to a case in the following year, *Greenwood v. Greenwood*.⁵⁰ That was a decision of Langton J., and the decision was based on a finding of connivance. Langton J. proceeded also to consider the question of undue delay, though the question of delay was not necessary to the decision. Dealing with the question of delay, he said⁵¹: "The other matter, the question of undue delay, is, to my mind, clearer still. I can well imagine that there might be two opinions about the question of the lady's connivance, especially as she was placed in a situation of very great difficulty; but as to the delay, I find it difficult to imagine that there can be two opinions at all. Once in 1920, and once again in 1933, with the fullest knowledge of all the circumstances, with every expectation that her husband would continue to live in adultery with this woman, Mrs. Greenwood, quite calmly, quite deliberately, came to the conclusion that she would prefer that things should remain as they were, so long as she was properly provided for. With every sympathy for her position, I cannot imagine, in those circumstances, that she could be allowed now to change her mind, in the face of the provision that she would take £1,000 in full discharge of all her husband's liabilities towards her. It would be odd indeed if she were allowed now to turn round and say: 'Well, my speculation or my investment having gone against me, my judgment having been proved to be wrong, I will now change the position which I have allowed him to occupy, a position in which I have acquiesced so long, and I will now come and ask the court to grant me a divorce in respect of adultery which has continued for 30 years to my knowledge without action on my part save the petition which I compromised in the year 1921.' To my thinking, judicial discretion, in those circumstances, can only possibly be exercised in one way, and that is, against her."

As I understand that judgment, the first basis of the decision was a finding of connivance, which is an absolute bar; but the finding of Langton J. on the question of delay is of great interest, and indeed of great help, in approaching the present problem. The reasons why delay is a discretionary bar are set out in *Johnson v. Johnson*,⁵² to which I have already referred. That was a somewhat unusual case, in that the respondent wife, who had committed adultery, was admitted to what was then called the asylum, and the husband, in the belief that she might not live

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⁵⁰ [1937] P. 157.⁵² [1901] P. 193.⁵¹ *Ibid.* 165.

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very long, forbore to take proceedings against her; but when he learned that though her mental disease was apparently incurable, she was likely to live on indefinitely, he did bring a petition for divorce on the ground of adultery. In the particular circumstances of that case Sir Francis Jeune P. was able to find that the husband's delay was justified and not unreasonable or culpable.

The first question I have to ask myself in this case is whether the delay was unreasonable or culpable, on the one hand, or excusable, on the other. Very many cases exist, and a good number of them have been cited in argument, where a delay, even of a considerable period, has been held to be excusable; or, if a double negative may be permitted, not unreasonable.

In the course of argument, I suggested that no doubt, as the result of the recent world war, there were many cases where a husband or a wife, with knowledge of a matrimonial offence, had been unable to bring proceedings through force of circumstances. I suggested as an example the case of a man who had learned of his wife's adultery and very shortly afterwards had been taken prisoner and was therefore unable to take proceedings. In such a case a delay of five years or more might be wholly excusable. It would be difficult to suggest that a delay of that kind could be in any sense culpable. An example of that in the reports is to be found, though at a much earlier date than the recent war, in *Pellew v. Pellew and Berkeley*.⁵³ The short facts of that case were these. The petitioner married the respondent in 1851, and in 1853 the petitioner, who was a flag officer in the Royal Navy, was appointed in command of the China Station, the respondent wife remaining with her mother in Brussels. The petitioner returned in 1854 and rejoined his wife, but shortly afterwards she ran away with another man, and in December, 1854, the petitioner obtained sentence of divorce a mensa et thoro. That was before the passing of the Matrimonial Causes Act, which first permitted the granting of divorces a vinculo. Subsequently the petitioner proceeded to try to obtain a divorce by a divorce bill; there were considerable difficulties and he was unable to proceed with the bill. A full court, presided over by Wightman J., said this in addition to those facts⁵⁴: "We think that the 'delay' intended by the 31st section "of the Divorce Act must be that sort of delay which would show "the petitioner to have been insensible to the loss of his wife, "and might almost be said to be equivalent to condonation. "Whatever delay there has been in this case is accounted for,

⁵³ 1 Sw. & Tr. 553.

⁵⁴ Ibid. 555.

"and we therefore dissolve the marriage." I mention that case as perhaps a classic example of a delay which is not unreasonable, because in the particular circumstances under which that petitioner found himself it is very difficult to imagine what else he could have done.

I have to consider here whether the delay in the present case is reasonable or unreasonable, and apply the principles as I understand them. I have no doubt whatsoever that the delay was unreasonable, and I follow the reasoning of Bucknill J. in *Binney v. Binney and Hill*.⁵⁵ I think that there has been culpable delay here, something in the nature of acquiescence, as to show this petitioner to have been quite insensible to the position and to the loss of his wife.

That leaves me with the second question. Having found the petitioner to have been guilty of unreasonable delay, ought I to overlook it, in the discretion which is given to me, and grant a decree in his favour notwithstanding? The number of reported cases in which discretion has been exercised in the case of a finding of unreasonable delay are remarkably few. The industry of counsel on both sides has brought to light three reported cases only, two of which I propose to refer to quite briefly. The paucity of reported cases is, I think, not any real indication of the true position. In this jurisdiction a very large number of cases are tried now all over the country, and of these a comparatively small proportion are reported. It may well be, and indeed I think it is, that vastly more than three cases have been dealt with since 1857, in which, although there has been a finding of unreasonable delay, a decree has been granted at the discretion of the court. I proceed on the basis that the paucity of reported authorities bears no relation to the number of cases in which the court has pronounced a decree notwithstanding an unreasonable delay.

I refer first to *Newman v. Newman*.⁵⁶ In that case the wife petitioner was married in 1844 and five years later the respondent committed incestuous adultery with the petitioner's sister. That distressing fact became known to the petitioner and she brought no proceedings against him until 1868, although she separated from her husband in January, 1850, when she discovered his adulterous connexion with her sister. The reason she gave for her delay was that her mother was very reluctant, in the family interests, to have a scandal, and she yielded to her mother's urgent entreaties, and had taken no step in the matter during

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⁵⁵ [1936] P. 178.⁵⁶ L.R. 2 P. & M. 57.

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her mother's life. As soon as the mother died she presented the petition. It also appears that the petitioner wife kept a school, which may possibly have had some effect on her desire not to incur any undue publicity; and on consideration of those facts, the Judge-Ordinary, Lord Penzance, said⁵⁷: "I adhere to the opinion that there was unreasonable delay in presenting the petition. But the statute does not say that in all cases where unreasonable delay has occurred a decree must be refused. It merely says that in such cases the court shall not be bound to pronounce a decree. The question is whether, assuming that there has been unreasonable delay, the case is one in which, under all the circumstances, the court should withhold a decree? No doubt the cases which the legislature had principally in view, when the provision as to unreasonable delay was inserted, were those in which a husband's honour had been wounded, and he had put up with his own disgrace for a length of time. The rule *vigilantibus non dormientibus jura subveniunt* obtained in the ecclesiastical courts, and was adopted by the House of Lords. That is one class of cases, and no doubt there are many others to which this discretionary bar is applicable. But, looking at all the circumstances of this case, I think I should not be justified in refusing a decree."

The Judge-Ordinary laid some stress on the husband's position, and of course it must be borne in mind that in 1873 the financial position of a husband and wife was widely different from what it is today, since at that time the Married Women's Property Acts had not been passed. Although the present case which I have to consider is a husband's petition, I should not in 1952, while giving all possible weight to this element, be prepared to distinguish to a great extent between a petition by a husband and a petition by a wife; but in that particular case there were circumstances, in particular the circumstances of the nature of the incestuous adultery, which are happily missing in the present case. One also has to consider that a petition of that kind in 1873 might possibly attract more attention than it would now. I think in considering these matters due force must be given to the changes in social manners and social values, and, indeed, moral values, over the past century. I am not, however, suggesting that discretion would not be exercised in 1952 on the same facts, if they arose, as arose in *Newman v. Newman*.⁵⁸

I pass to a much more recent case, *Stevenson v. Stevenson*

⁵⁷ L.R. 2 P. & M. 57, 58.

⁵⁸ Ibid. 57.

and Lane,⁵⁹ which was tried in 1946. That was a decision of Hodson J. in relation to the petition of a husband petitioner who was a merchant seaman. He appears to have had a somewhat chequered matrimonial career. He was married to his wife in 1914 and there was a deed of separation in 1927. He brought a petition in 1928, cross-charges were made by the wife, but it was never tried and was dismissed in 1939. He brought another petition in December, 1938, alleging his wife's adultery from 1932 onwards. The wife respondent admitted her adultery and pleaded connivance by way of answer to the husband's petition. It appears from the facts that by 1932 the petitioner and the respondent had come to quite amicable terms in which, although the wife was living with the co-respondent, the petitioner was able to stay with her when he came home from sea in order to see the children, and the court found as a fact that by 1933 he knew of the respondent's adultery and thereafter continued on friendly terms with his wife and the co-respondent, who, by 1935, were living openly together. The case started by a petition in 1938, and no doubt because of the circumstances of the war (the husband was a merchant seaman) the case did not come to trial until 1946. The matter was argued, and Hodson J. exercised his discretion. He rejected the allegation of connivance, but he had to consider whether or not the petitioner had been guilty of unreasonable delay. After considering an observation of Lord Stowell in *Crewe v. Crewe*,⁶⁰ he said that: "The Matrimonial Causes Act, 1857, did not put unreasonable delay in the same category as connivance, which remained an absolute bar. Unreasonable delay was a discretionary bar, and even were the delay found to be unreasonable, having regard to the measure of toleration accepted in the present case, the matter was still one of discretion. Bearing in mind the petitioner's profession, his need to save money to meet the costs of the present action, and his desire to see his children, his Lordship found an explanation, if not altogether an excuse, for the petitioner's tolerance. Though there had been unreasonable delay, he would exercise his discretion in the petitioner's favour and pronounce a decree of divorce." Then he referred to the respondent's financial support.

Now that was an important example of a case where the judge found that the delay was unreasonable but nevertheless found it to be a proper case for the exercise of the court's discretion.

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⁵⁹ [1947] W.N. 83.⁶⁰ (1800) 3 Hagg.Ecc. 123.

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Hodson J. found that the husband's position as a merchant seaman was not altogether an excuse but was at least an explanation for his tolerance. It is perhaps unnecessary to emphasize the somewhat obvious fact that the position of the petitioner in *Stevenson v. Stevenson and Lane*⁶¹ was wholly different from the position of the petitioner in the present case.

Mr. Millar, in the course of his excellent argument today, laid much stress on the decision of the House of Lords in *Blunt v. Blunt*.⁶² That was an appeal concerning the exercise of the discretion of the court to grant a decree of divorce notwithstanding that the petitioner had been guilty of adultery, and in his speech,⁶³ Viscount Simon L.C. made it perfectly clear that he was dealing with that issue. No question of delay arose in *Blunt v. Blunt*,⁶⁴ but Mr. Millar argued, and in my view rightly, that the principles of the exercise of discretion which were set out and enumerated by the Lord Chancellor in his speech are of general application wherever the burden is put on the court of exercising discretion. It is useful that I should remind myself of what were the Lord Chancellor's categories of grounds for the exercise of the discretion.⁶⁵ He put the position and interest of any children of the marriage as the first. So far as this case is concerned that does not arise because the one child of the marriage is of full age and is not affected by the outcome of the case. The second point was the interest of the party with whom the petitioner had been guilty of misconduct, with special regard to the prospect of their future marriage. That also does not arise because the woman with whom misconduct took place has long since been married. Thirdly: the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife. So far as I can judge in this case there is no reasonable prospect of reconciliation. Fourthly: the interest of the petitioner, and, in particular, the interest that the petitioner should be able to remarry and live respectably. The petitioner in this case, who is of no very advanced years—he is in the early fifties—says he does want to remarry and says at the moment he is tied to a wife with whom there is no real prospect of his resuming cohabitation. Fifthly: Lord Simon advanced a consideration of a more general character which he regarded as of primary importance, namely, the interest of the community at large, “to be judged by maintaining a true balance between respect for the binding sanctity

⁶¹ [1947] W.N. 83.⁶⁴ [1943] A.C. 517.⁶² [1943] A.C. 517.⁶⁵ Ibid. 522.⁶³ Ibid. 525.

“ of marriage and the social considerations which make it contrary
 “ to public policy to insist on the maintenance of a union which
 “ has utterly broken down.”

I have to try and maintain a balance between respect for the sanctity of marriage and the social considerations which make it undesirable in the public interest to keep this long defunct marriage alive. Applying that, as I do, to the present case, I must also consider, in the light of those principles, the position in a case of unreasonable delay. As was pointed out in *Johnson v. Johnson*,⁶⁶ there are strong reasons of public policy why, if adultery is known, proceedings should be taken as soon as possible. As the President said in that case⁶⁷: “ It is a terrible thing that
 “ people should be going about the world neither married nor
 “ unmarried, possibly liable to contract fresh and illegal matri-
 “ mony, and certainly exposed to temptation to commit adultery.”
 In this case I do not know whether the respondent wanted to marry. I do not even know whether Mr. Mann was free to marry; but if the petitioner desired to free himself of this legal tie, in my view he should have done so many years since.

Having considered the facts of this case and the discretion vested in me, and the principles on which such discretion should be exercised, I do not think that I should be exercising that discretion properly or judicially if I exercised it in the petitioner's favour. I am quite unable to do so, and I must therefore dismiss this petition.

Solicitors: *E. Edwards, Son & Noice; The Queen's Proctor.*

J. B. G.

⁶⁶ [1901] P. 193.

⁶⁷ *Ibid.* 195.

WHITE v. WHITE

(QUEEN'S PROCTOR SHOWING CAUSE).

1952
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Willmer J.

Husband and Wife—Intervention by Queen's Proctor—Failure to make proper admission of adultery—Considerations of public policy—Rescission of decree.

Those who come to the Divorce Court and seek relief are expected to disclose the whole truth; and the court will be loth to lend colour to the idea that a petitioner is free to lie and to

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deceive the court until such time as he is found out, but that, having been found out, he can by telling the truth at long last expect the court to exercise discretion in his favour. It would be disastrous if such an idea were to gain currency, and would lead to further perjury in the court.

On an intervention by the Queen's Proctor the court will consider not only the interests of the immediate parties, but the public interest.

Where, therefore, a petitioner who had been granted a decree nisi of divorce on the ground that his wife was incurably of unsound mind, but had failed to pray for the exercise of the court's discretion, admitted one adulterous association when the King's Proctor filed a plea but continued to conceal a further adulterous association until the plea was amended, and was held to have practised a course of deceit for many years, the intervention was allowed, the decree nisi rescinded, and the petition dismissed.

INTERVENTION by the Queen's Proctor.

The petitioner, the husband, was married in 1919 and in 1939 his wife was admitted to a mental hospital. In February, 1950, he filed a petition for divorce on the ground that his wife was incurably of unsound mind, but he did not include a prayer for the exercise of the court's discretion. The Official Solicitor entered an appearance as guardian ad litem for the respondent and filed an answer formally denying the allegations; but the petition was in effect not defended, and a decree nisi was granted on November 21, 1950.

The Official Solicitor had, however, made certain inquiries, and following those inquiries had written to the petitioner's solicitors some months before the hearing to make certain that the petitioner had been asked whether he had committed adultery. The solicitors had replied, in April, 1950, that the petitioner had informed them that no adultery or other matrimonial offence had been committed. The Official Solicitor communicated with the King's Proctor shortly after the decree nisi, and the Attorney-General directed an intervention when certain evidence was submitted to him. On January 29, 1951, the King's Proctor filed his plea, having appeared to show cause on January 2, 1951. By his plea he alleged that the decree nisi had been obtained contrary to the justice of the cause by reason of material facts not having been brought to the notice of the court; and alleged that from about 1942 until August, 1946, the petitioner had committed adultery with a spinster named Matthews. No appearance was entered by the woman, who was duly served.

On March 5, 1951, the petitioner filed an answer to the plea of the King's Proctor admitting the adultery, adding that "he

"was not aware that adultery committed long before the date of "the petition should have been disclosed to the court." He prayed for the exercise of the court's discretion in his favour. In his discretion statement he admitted adultery with Miss Matthews from 1941 to 1948 (not 1946 as alleged), and said that she had had a child by him in September, 1945. He said that his wife had first been certified in November, 1939, and that apart from a period between November, 1942, and May, 1943, when she had been discharged to the care of her sister, she had been continuously detained ever since. His association with Miss Matthews, he said, had not been happy and they had parted on bad terms.

He further stated that he had first given instructions to his solicitors in October, 1949, and that his solicitor had asked him at the first interview whether he had committed adultery. He said: "As my adulterous association with Miss Matthews had "taken place so long ago I thought it was not necessary to "disclose it. Also I wished the unhappy existence I had had "with Miss Matthews to be forgotten." He had told his solicitors when they wrote in April, 1950, that he had not committed adultery "as I still thought that my past adultery need "not be disclosed and as I still very much wished to forget it."

He added that he had been lodging for over a year with a widow whom he had known for over 10 years and that they had grown very fond of each other. His son, born in 1938, had been lodging with them, and the widow was willing to look after him. He had not committed adultery with her, but if his existing marriage were dissolved they wished to be married.

After the answer to the plea had been filed, further information was received, and the plea was amended, in March, 1952, to allege that the petitioner had lived and committed adultery with a widow, then named Taylor, between February and May, 1944. The petitioner admitted this further adultery and in a supplemental discretion statement stated that he had had a violent quarrel with Miss Matthews and had gone to lodge with Mrs. Taylor. He had returned to Miss Matthews in May, 1944, and had never seen or written to Mrs. Taylor again. He had not disclosed this adultery because he was afraid he would lose his decree; and although he had previously told the widow whom he hoped to marry about Miss Matthews, he had not told her about Mrs. Taylor until the plea was amended. She (the widow) had been much upset, but had said that she would reconsider the question of marrying him if the decree were allowed to stand. He appreciated that every opportunity had been given him to

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make a full disclosure earlier, and threw himself on the mercy of the court.

James Comyn for the Queen's Proctor.

J. W. Miskin for the petitioner.

WILLMER J. I have no doubt that the Queen's Proctor's plea must be allowed in this case. I find it very difficult in the circumstances to see any reasons for exercising my discretion in favour of the petitioner. He has practised a course of deceit for many years; he has deceived first one woman, and then another; he has deceived his own solicitors; he has deceived the Queen's Proctor; and he has done his best to deceive this court. When the Queen's Proctor found out and accused him of an association with one woman, he admitted it, but he continued to conceal his association with another woman. When the Queen's Proctor found out about that, and charged him with it, he admitted that adultery. He says now that he has told the whole truth. I confess that I am left in doubt whether he has now told the whole truth or not. Neither his past behaviour, nor his demeanour in the witness box, pointed very decisively to any such conclusion.

But even assuming that I were satisfied that he had now told the whole truth, I do not think it would make any difference to my decision. I have to consider here not only the interests of the immediate parties to this suit, and not only the interests of those persons who are intimately connected with them or dependent upon them: I have also to consider the public interest. So far as the interests of the parties are concerned, there is not really any very cogent ground in this case why I should exercise my discretion in favour of the petitioner. If it were the fact that he was anxious to be free so as to marry the woman with whom he lived for eight years, and who has borne him a child, that, I think, might have been a consideration of some cogency. But he does not pretend that he desires to be free for that purpose. He wants his freedom so that he may marry yet another woman. He has a young child, a boy now 14, who is being looked after by the woman that he would now like to marry. I have to consider that matter. But I do not really see that the boy's interests would be particularly furthered if his father were free to marry this other woman. He will be leaving school, presumably, in the course of the next year; and I am told that his desire then, in so far as it has become apparent,

would be to go into the Navy. It seems to me, therefore, that the interests of this child do not really affect the matter very much. Indeed, as I have already said, I can see little in the interests of the parties which would, upon any view, call particularly powerfully for the exercise of discretion in favour of this petitioner.

But when one looks at the public interest, the case against the petitioner seems to me to be overwhelming. Even if it were the fact that today he has spoken the truth, and the whole truth, it seems to me that it would be a most dangerous precedent if I were to exercise discretion in favour of this petitioner. It cannot be emphasized too strongly that those who come to this court seeking relief are expected to come here disclosing the whole truth—or, to use a phrase which has become hackneyed in modern politics, they are expected to put all the cards on the table face upwards. I should be very loth to do anything which might lend any colour to the idea that a petitioner is free to lie and to deceive the court until such time as he is found out, but that, having been found out, he can then by telling the truth at long last expect the court to exercise discretion in his favour. If any such idea were to obtain currency, it seems to me that it would be quite disastrous, and would lead to a great deal more perjury in this court than there already is. This case seems to me to provide an opportunity for insisting once more on the duty, which every petitioner owes, of making a full disclosure. When, therefore, I look at the facts of this case from the point of view of the public interest, it seems to me that there can be but one answer, and that regardless of whether I have now heard the whole truth or not. After the way in which this petitioner has treated the court it is, to my mind, quite out of the question that I should exercise discretion in his favour. The result is, therefore, that I allow the plea of the Queen's Proctor: the decree will be rescinded and the petition dismissed.

Decree nisi rescinded.

Solicitors: *The Queen's Proctor; Baylis, Pearce & Co., for Stevens & Bolton, Farnham.*

J. B. G.

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